# A COMPARISON OF THE ANTIDUMPING SYSTEMS OF CANADA AND THE USA

A STUDY PREPARED
FOR THE

DEPARTMENT OF FINANCE
GOVERNMENT OF CANADA

Peter Clark
President
Grey, Clark, Shih and Associates, Limited
Ottawa, Canada

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## EXECUTIVE SUMMARY

1. This study identifies and assesses differences between Canadian and U.S. antidumping (AD) laws and practice including revisions to reflect the World Trade Organization Antidumping Agreement (WTO ADA). This executive summary and the broad conclusions summarized in Chapter IV will be useful to those who are interested in how antidumping laws work but who may not have the time nor the inclination to delve into detailed analysis of antidumping laws in the remaining chapters.

2. The analysis reflects my experience as a policy advisor, administrator, investigator, negotiator and practitioner as well as discussions with colleagues and practitioners in Canada and the USA.[1] A range of issues were discussed with administering authorities, including members of the Canadian International Trade Tribunal (Tribunal) and Commissioners of the United States International Trade Commission (Commission). Submissions were received from and/or discussions held with the Canadian Steel Producers Association (CSPA), Canadian auto parts manufacturers, representatives of other industries in Canada and the USA (including the U.S. steel industry), and the Canadian Importers' Association.[2] Parts of the text were reviewed in draft by experienced officials and practitioners in Canada and the USA. Their advice and comments have been very helpful and have been incorporated wherever possible. However, any errors that remain are my own.

3. Canadian and U.S. antidumping systems differ in legislative provisions, administrative procedures and practice. Both systems are costly to access and are burdensome for respondents. Manufacturers in both Canada and the USA argue that their own AD system is not as effective as it should be. In their view, other countries discipline injurious dumping more effectively than their own authorities do. Clearly no exporter enjoys the irritation, cost and administrative burdens of being named in an antidumping action. What they consider to be fair play when protecting their own market becomes evil and harassing when they become the target of another's action. However, this study concludes both systems are effective in achieving their basic purpose, which is to eliminate the injurious impact of dumping.[3]

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1 This study expands on and updates an earlier draft prepared in conjunction with Riyaz Dattu, Partner, McCarthy Tetrault. Because the study has undergone such extensive revisions, particularly with respect to WTO ADA implementation, responsibility for the analysis and conclusions is mine.

2 While much AD activity between Canada and the USA in the 1990s has involved North American steel producers, this is not a study about dumping in that sector. However, CSPA concerns have been analyzed and reviewed in the context of Commerce AD investigations on *steel rails* and Revenue Canada's and Commerce's investigations of *flat-rolled steel products* and Binational Panel reviews of those decisions.

3 Defined in its simplest terms, dumping results from a firm selling a product in an export market at prices lower than in its domestic market. Over time, this definition has been extended to include exports at prices that do not reflect fully absorbed cost of production plus an amount for profit generally earned on home market sales.

4. Conventional wisdom in Canada suggests that U.S. AD laws and practice are far more effective than Canada's. This study examines in the broad elements of each system. It does not and cannot examine each minute and discrete procedure followed by administering authorities. While these procedures have been considered in reaching conclusions, time and space does not permit them to be examined in greater detail. There are simply too many permutations and combinations to be considered, particularly in the context of constructed value analysis.

5. The study concludes that each country has some elements of AD administrative practice that are more restrictive than the other's, the WTO ADA has reduced differences. These differences are most important in the area of ongoing enforcement. The U.S. enforcement system creates uncertainty and imposes heavy compliance burdens. The Canadian enforcement system is not ineffective; it is, however, less burdensome and more predictable.

6. Antidumping laws will tend to have a greater impact on Canada than on the USA even if the laws and regulations are identical and all investigators and decision makers equally enlightened. This is a fact of economic life based on the reality of differences in size of markets. Industry in Canada is probably more vulnerable to dumping related injury than their counterparts in the USA because of Canada's smaller domestic market. At the same time, because Canadian manufacturers in most industries tend to be more export dependent than their U.S. counterparts they will be impacted more seriously by the uncertainties created by antidumping investigations of their export activities and by the imposition of antidumping duties.

7. Implementation of the WTO ADA eliminated some differences and encouraged harmonization of regulation and practice.[4] U.S. and Canadian requirements to initiate an investigation are now more parallel. Nuisance cases should be precluded by improved positive methods for determining support for a complaint (standing). Further improvements include:

- new provisions have been introduced in both Canada and the USA to treat non-recurring or start-up costs in a fairer and more reasonable manner, but much remains to be done in this area.

- WTO provisions to reduce the risk of dumping being found through improper use of averaging have been implemented. Arbitrary or fixed amounts for profit may no longer be used in constructed cost calculations.

- the USA has introduced a sunset clause to review outstanding injury findings. Canada introduced a similar provision in 1984.

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[4] See David Palmeter. *Operation of the U.S. Trade Laws on the Post-Uruguay Round Era*, Report presented to the UNCTAD (December 1995) 2. In United States Implementation of the Uruguay Round Antidumping Code Journal of World Trade, Vol. 29, No. 3 (June 1995): 39. Mr. Palmeter notes that the WTO ADA - "... required relatively few changes in the lengthy and detailed Antidumping Law of the United States. *Some of these changes, however, are important and, for the most part are trade liberalizing*". (emphasis added)

- the duration of uncertainties in the U.S. enforcement system have been reduced but enforcement remains an important problem and a very significant difference between Canada and U.S. administrative practice.

8. As noted above, the most important differences between Canada and the USA are enforcement and cost of compliance. Revenue Canada generally establishes prospective normal values that is undumped export price levels which eliminate the need to pay antidumping duties.[5] These normal values which are updated regularly, apply to future importations. This prospective system effectively eliminates both dumping and injury caused by dumping. Importers know their liability for duty and their costs before importing the subject product.

9. Under the U.S. Customs service retrospective methodology, a deposit is collected in the amount of estimated antidumping duties. All importations are reviewed periodically (usually annually) by the Department of Commerce (Commerce) and additional duties may be collected or deposits refunded. In addition to the uncertainty which may last two years or more, Commerce administrative reviews must address and assess liability for each importation. The process is much more onerous than Revenue Canada's which may involve only a recent 60 day period in order to establish new normal values. Further, Commerce applies different rules in reviews than in the original investigation; rules which are more likely to establish dumping. However, the U.S. administrative review is now subject to shorter time limits as a result of implication of the WTO ADA.

10. The U.S. system permits exporters to reduce home market prices in order to eliminate dumping. This can result in the refund of antidumping deposits (after the administrative review) even if the exporter has not raised its prices to the USA.[6] This may be a practical option for some producers/exporters whose sales to the USA are much greater than in their domestic market. In these cases, it may be appropriate to forego higher pricing at home to maintain access to the larger USA market. In such situations, dumping may be eliminated but there will be no relief from injurious import competition. However, this may not be possible in some situations (e.g., many constructed cost investigations), and even where it is possible, it may not be a feasible nor an attractive option.

11. Although the Revenue Canada enforcement system is different from that of Commerce, it cannot be said it is less effective in achieving the Government of Canada's (and the WTO ADA's) objective - removing the injurious effects of dumping.

12. Antidumping regimes, if they are based on the relevant WTO rules, are designed to eliminate injury to local producers demonstrably caused by dumping.[7] Both Canada and the USA may in some situations impose antidumping duties that exceed the amount actually required to eliminate injury due to dumping. In these cases, additional duty may be seen as windfall or excess protection. Too little consideration is given to this situation and the implications for users of the dumped product.

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[5] In complex investigations, Revenue Canada may impose a duty based on a percentage of export price.

[6] See "Canada steel firms to get millions" *Globe and Mail*, March 29, 1996.

[7] Antidumping duties are not a cure-all. They are not meant to address injury not attributable to dumping.

13. Both Canadian and U.S. antidumping systems are complex - and their complexity is increasing even after implementing the WTO ADA. To an important degree, this is due to the proliferation of trans-national corporations whose cost-allocation methods and transfer pricing practices require special investigatory and cost attribution methodologies.[8] Complexity may be the price for fairness. Sophisticated record keeping can help to isolate evidence necessary to secure favourable adjustments or to address "shotgun" allegations and evidence of injury.

14. Antidumping laws allow for disciplining practices of foreign competitors such as injurious price matching, freight absorption or freight equalization which are not actionable under domestic competition or anti-trust laws. Nor do antidumping laws make allowance for selling at prices above variable cost but below fully absorbed costs.[9] Canadian exporters have asked why antidumping and not competition laws should regulate discriminatory pricing in a Free Trade Area. Analysis of this proposal goes beyond the scope of this study. However, several prominent Canadian competition practitioners have written thoughtfully on the subject and rejected the option.[10]

15. The essential purpose of AD laws is to discipline the injurious effects of dumped imports.[11] It is not surprising that exporters consider that any antidumping investigation targeted against them constitutes harassment and a blatant protectionist attack designed to reduce their exports. Canadian exporters and exporters in third countries who have been exposed to the U.S. AD system agree that the investigation, verification and enforcement in the USA is quite rigorous. Nor do third country exporters consider their exposure to Revenue Canada investigators a pleasurable experience. However, the enforcement system in the USA generates considerable uncertainty, and may discourage or frustrate continuing trade, including undumped trade.[12]

16. In particular cases, investigating authorities may act or appear to act with excessive zeal. Excessive zeal is difficult to identify or to measure; much of this evidence was anecdotal or based on subjective perceptions. (Targets of AD actions never view them as benign. AD systems are not viewed as good or better - all are bad and some are worse.) The proper test is whether Revenue Canada's[13] practice would preclude treatment of foreign selling or costing practices the same way

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8 Canada recognized this was an emerging problem when the Antidumping Act was introduced in 1968.

9 Peter Clark in a Presentation to Canadian Importers' Association, Toronto, April 12, 1994.

10 See for example, C.J. Michael Flavell, Q.C., and Christopher Kent, *Should Domestic Antidumping Law be Replaced with Competition Law?*, Competition Law; Vol. 13, p. 28, and C.J. Michael Flavell, Q.C., *Competition Law; The "Solution" for Trade Policy "Problems"? Not!*, presented to the C.D. Howe Institute (unpublished).

11 The purpose is not to eliminate dumping without regard to injury.

12 One U.S. practitioner, who normally but not exclusively represents petitioners, commented that the U.S. justification of its system of retroactive revision of duties is that the USA wishes to provide an opportunity for exporters to eliminate dumping margins. I have also heard these arguments from U.S. negotiators but cannot link them to a particular document.

13 Revenue Canada, Antidumping and Countervailing Duties Division, referred to here after as Revenue Canada.

Commerce would.[14] On balance, there is little difference between Canadian and U.S. practice in the initial investigation.[15] Amendments to implement the WTO ADA brought Canadian and U.S. practice closer together.

17. Failure to cooperate fully with either Canadian or American antidumping investigators will result in the use of arbitrary methods which often result in effective exclusion of the uncooperative exporters from the market. The burden of compliance in both systems makes complete co-operation very costly. Experience suggests that access to both systems is now beyond the means of small- and medium-sized business. The costs of participation exceed potential benefits and the prospects for no injury findings are limited. Thus complexity and cost may discourage compliance and may persuade foreign suppliers to abandon markets.[16]

18. Once dumping has been determined, an inquiry is undertaken to determine whether or not the dumping has caused or threatened material injury to production in the importing country. Independent agencies are responsible for injury investigations/inquiries. The Canadian International Trade Tribunal (Tribunal) and the United States International Trade Commission (Commission) are responsible for these deliberations. The Commission process is more investigatory than the Tribunal's which is much more like a trial, where parties have an opportunity to test each other's evidence.[17] Both procedures are burdensome and risk becoming even more onerous and costly.[18] Neither the Commission nor the Tribunal is reluctant to reach affirmative injury findings.

19. Statistically both systems appear to be relatively equivalent in providing protection from dumped and injurious imports. For example, the margins of dumping found by Revenue Canada and Commerce in the 1992/93 flat-rolled steel cases were roughly comparable; indeed, margins found for third countries by Revenue Canada were often higher. There were two no-injury findings for Canada in the U.S. cases and two for the U.S. in the Canadian cases.[19]

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[14] Certain practices in recent Canadian and U.S. decisions were reviewed with Revenue Canada and former U.S. Department of Commerce experts. Commerce and Revenue Canada reached the same or similar conclusions in similar circumstances.

[15] Other than statutory minima in the USA, which have now been eliminated by implementation of the 1994 AD Agreement and certain cost averaging methodology by Commerce which might be beneficial in some circumstances and not in others.

[16] See David Palmeter, *"The Antidumping Law: A Legal and Administrative Non-Tariff Barrier"* in *Down in the Dumps*, edited by Richard Boltuck and Robert E. Litan (the Brookings Institution, Washington, D.C., 1995): 80. For a very detailed analysis of the problems encountered in an investigation, see the report of the Binational Panel in *New Steel Rail, Excluding Light Rail, from Canada*, (USA-89-1904-08, August 30, 1990).

[17] Tribunal procedures do not, however, permit discovery. However, it is debatable whether the additional time and cost would produce better results.

[18] The WTO ADA, in attempting to safeguard against abuse, has become much more detailed. In part, this has been done to encourage uniformity and greater transparency. Greater transparency of procedures has not necessarily reduced the burden and cost of compliance. Hopefully, it will improve the prospects for successful defence.

[19] The Canadian carbon steel plate inquiry was actually two investigations; one for heat-treated plate and one for not heat-treated. These were joined into a single investigation

20. Readers should not rely too heavily on statistics of frequency of injury findings or the magnitude of antidumping margins to draw definitive conclusions about similarities or differences in the systems. Statistical analysis may mask important qualitative differences[20] in circumstances and indeed the real impact of decisions by investigatory or administering authorities. The qualitative aspects of this analysis are more important than any statistical "ready reckoning". However, the information required to do a complete qualitative analysis is not available, nor within the scope of this study.

21. One cannot simply assess impact by the frequency of affirmative injury findings and the magnitude of dumping margins found in each country. The frequency of affirmative injury determinations does not in itself necessarily tell us how effective a system is. A high percentage of affirmative injury findings may reflect proper screening of complaints prior to initiation as well as the ability of experienced counsel to avoid starting fights that are unlikely to be won. It may also be a function of smaller markets being more vulnerable to dumping than a larger one. It is important to compare the individual aspects of the two AD systems, including legislation, procedures, practice and cost of compliance and effect.

22. Each individual factor in the antidumping investigation and injury inquiry must be given appropriate weight as the importance of a particular factor will vary from one investigation to another. Although exporters might be able to make valid and objective comparisons based on their experience as respondents under both systems for the same product at the same point in time, those companies, with very few exceptions, are not likely to be located in either the USA or Canada.

23. Revenue Canada's investigators tend to have greater industry-specific knowledge than their U.S. counterparts. This in-depth experience in specific industrial product sectors enables them to seek and obtain, effectively verify, and analyze the information they require.[21] The Inspector General of the U.S. Commerce Department auditing the flat-rolled steel investigations concluded that lack of

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before the Tribunal inquiry was initiated.

[20] The product and country coverage may be different, as may be the timing and the strength of local producers.

[21] It would appear that Revenue Canada has made much progress since 1980. Stelco, Dofasco and Algoma, in commenting on Proposals on Import Policy, expressed concerns about staffing at Revenue Canada. They noted:

> "In determining and analysing what are frequently very complex, but very important, data and information, the Department is almost totally dependent upon the responses which it obtains from questions posed to the foreign exporters, who clearly have a self-serving interest in the result. It is virtually impossible, under present procedures, for the Departmental officers to have sufficient knowledge or understanding to be able to assess the quality or the good faith of the foreign exporters supplying the information. They are like the prize fighter entering the ring with one arm tied behind his back."

(Joint Submission of the Algoma Steel Corporation, Limited, Dofasco Inc, Stelco Inc. to the House of Commons Sub-Committee on Import Policy, March 30, 1981, 14.)

experience and industry knowledge among Commerce antidumping investigators leaves much to be desired in their performance.[22]

24. Antidumping legislation is administered and enforced differently in Canada and in the USA. Both systems are complex, and both are administratively and financially burdensome. Although Commerce's approach to the determination of dumping margins is more transparent than Revenue Canada's, this greater transparency does not necessarily translate into greater fairness,[23] at least in the earlier stages of investigation. AD investigations in the USA generally involve a higher cost of compliance than those in Canada. To some extent, this is a function of the greater volume of trade covered by an investigation of dumping into the larger U.S. market. The antidumping system administered and adjudicated by Revenue Canada and the CITT is as effective as the Commerce/USITC AD regime.

25. The study concludes with respect to some of the important elements of AD policy that:

- Revenue Canada has in the past been more thorough and proactive than Commerce about determining industry support for a complaint than Commerce. Differences in practice have been narrowed by implementation of the WTO ADA on Antidumping.

- After initiation, during the investigation phase, Commerce requirements on respondents can be more burdensome than Revenue Canada's.[24] This is often due, at least in part, to a higher volume of exports to the USA that require more documentation and more voluminous responses. However, because the WTO ADA provides detailed instructions about how to calculate dumping, it should not be surprising that Revenue Canada and Commerce require and seek similar information. Revenue Canada may require information at a different point in time than Commerce in its requirements but this appears to be due in large part to differences in statutory timelines. Both administrations treat deficiencies in replies quite harshly. Commerce procedures require notification of deficiencies to respondents so they may remedy them. Revenue Canada tends to "estimate" at the Preliminary Determination and correct deficiencies before the Final

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22 U.S. Department of Commerce, Office of the Inspector General (OIG) on *Operations of the Import Administration*, Report No. TTD-5541-4-0001 (December 1993). A Canadian exporter commented that this relative inefficiency and lack of expertise can make investigations and verifications more burdensome and compliance more difficult.

23 Revenue Canada is transparent in its dealings with respondents, particularly from the preliminary determination onwards. The Department provides a full disclosure of their methodology and calculations. While access to confidential information is envisaged in SIMA, Revenue Canada does not normally provide a petitioner's counsel access to the confidential submissions of respondents.

24 The questionnaire in the first Revenue Canada investigation under the revised (1995) Special Import Measures Act (SIMA) have been more burdensome than most earlier requests for information. This is because the revised SIMA requires more detail in order to assess profitability of home market sales and certain review periods have been extended.

Determination. Once again, this is due to statutory time limits. Computerization has made it easier for investigators to demand and receive ever more detailed information, increasing administrative costs and burdens of compliance.

- While Revenue Canada appears to be more rigorous in its preliminary assessment of antidumping petitions than does Commerce, the U.S. preliminary injury determination by the USITC eliminates more complaints at the preliminary stage[25] than the restricted and less transparent preliminary injury review undertaken by the CITT.[26] Draft complaints are thoroughly reviewed by Commerce and, like in Canada, most frivolous and/or unfounded petitions do not survive.[27]

- When Commerce and USITC activities are considered together, the impact of the pre-initiation/preliminary injury phases in both countries are roughly equivalent.[28] Revenue Canada's requirements are not designed to frustrate complainants. WTO ADA requirements that a properly documented complaint contain a reasonable indication of dumping, material injury (or threat thereof) to domestic production, and a causal link between the alleged dumping and the claimed injury are respected. There is no graveyard at Revenue Canada littered with the corpses of sound complaints unreasonably rejected. Should Revenue Canada decline to initiate based on inadequate of evidence of injury, the petitioner may seek a review by the Tribunal on the issue of injury. The Tribunal seldom reverses the decision of the Deputy Minister, Revenue Canada to initiate or not to initiate an investigation.

- The process for determining dumping and verifying respondents' submissions in both countries is very complex. The normal information requirements of respondents for initial investigations by Revenue Canada are essentially as burdensome as U.S. requirements, relative to the volume of trade involved.

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[25] David Palmeter. Report to UNCTAD, 1-2, where he notes that 2 of 12 investigations in the first 11 months of 1995 were terminated by the Commission. In *Polyvinyl Alcohol from China, Japan, Korea and Taiwan*, 731-TA-726-729 (Preliminary), USITC Pub. 2883 (April 133), he states this decision with respect to Korea was directly attributable to changes in U.S. law required by the WTO ADA.

[26] Revenue Canada is responsible for pre-initiation screening. Neither Revenue Canada nor Commerce seeks information from potential respondents prior to initiation. Revenue Canada may, however, take account of unsolicited submissions from potential respondents; Commerce may not, with the exception of submissions related to standing, go beyond the four corners of the complaint. The Tribunal must base its preliminary injury assessment on the information before Revenue Canada.

[27] United States General Accounting Office (GAO), Report to Congressional Requesters, *International Trade: Comparison of U.S. and Foreign Antidumping Practices*, GAO/NSIAD-91-59, (November, 1990), 19.

[28] Some cases that are initiated, eventually fail because, after thorough analysis, there is (a) no dumping; (b) no injury; or (c) no causal link between (a) and (b). Historically, about 30 per cent of cases fail at the final injury determination in both jurisdictions.

- Revenue Canada and Commerce employ similar methodology for identifying and calculating dumping. Certain practices in each system may be considered to be more restrictive than those of the other[29] on a general basis or in the context of a particular investigation. On balance, there is little difference in the levels of underselling (dumping) found in both countries.[30]

- Commerce grants petitioners' counsel access to the confidential submissions of respondents under an administrative protective order. SIMA contemplates similar access but as a matter of administrative practice, Revenue Canada does not automatically grant such access.[31]

- Access to confidential information permits U.S. counsel for petitioners to better monitor Commerce's activities. Petitioners' counsel input often leads to demands for additional information by Commerce and increases the cost of participation and compliance for both respondents and petitioners.[32] However, discussions

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[29] In the USA, pre-WTO legislated minimum profit and GSA expenses were examples. In Canada, treatment of certain expenses, including cash discounts and deferred discounts and rebates, was and continues to be less generous than Commerce practice.

[30] While this is a generalization, and the validity to the generalization may be affected by timing and circumstances, to do more than generalize would require more time and information than is available.

[31] If the respondent fails to provide a detailed non-confidential summary of its submissions, Revenue Canada would likely grant access to the confidential filings. See also Electrohome Ltd. and Deputy M.N.R., 11 CER 31, where Rouleau J. explained:

> "Disclosure of information, which is an essential element of the scheme and purpose of the Act must be balanced against some measure of reassurance to foreign companies that the confidential information with which they entrust our public officials will not be disclosed upon request. Consequently, even if I were persuaded that the word "may" in subs. 84(3) could have two possible interpretations I would be precluded from finding that it was mandatory as such a finding would fail to achieve the manifest purpose of the Act. The court should avoid a construction which would reduce the legislation to futility and should rather accept the construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. Were I to accept the applicants' argument that once a request is made for confidential information the Deputy Minister no longer has any discretion in the matter, except to set out the terms and conditions under which it was release, I would be rendering the confidentiality provisions of the Act null and void. In effect, there would be little point in a foreign company designating the information provided by it as confidential since the Deputy Minister would have to disclose it upon request in any event."

[32] It is understood that APO access at Commerce was introduced because Congress in 1979 considered that the U.S. dumping authorities (Treasury) favoured respondents and a check on them was necessary. Whether or not it is too late for Commerce to reverse its

with U.S. experts and a review of Federal Register Notices of investigation results, suggest petitioners input may not have a determinative impact on final margins. Petitioners' comments may be adopted in some cases but in others, Commerce also accepts comments by respondents. Should Commerce disagree with the interventions by petitioners, they will reject them.[33] Canadian exporters, even those who have done well in responding to these additional questions, consider the process to be coordinated harassment, which adds to the cost of investigations, and increases the possibility of decisions based on "facts available".

- Counsel to petitioners can and do make representations to Revenue Canada about issues and practices they consider should be addressed during the investigation/verification and how they should be treated.[34] Further, Revenue Canada works closely with petitioners during the complaint assessment phase of the investigation in order to understand the production and costing processes for the subject products of the investigation. They also co-operate with petitioners to develop cost modules in order to assist them in verification. These modules permit easy identification of abberations from the norm and facilitate more effective and intensive verification of specific issues. Petitioners are not directly involved in or present at verification in either country.[35] It is understood that Revenue Canada considers their statutory time limits are too short to consider comments on respondents' filings by petitioners' counsel,

- In Canada, a negative Preliminary Determination (P.D.) of dumping terminates an investigation. In the USA, Commerce may continue their investigation to a Final Determination (F.D.) notwithstanding a negative P.D. However, in Canada, exporter responses are verified before the P.D. is made. Because of tight time limits in SIMA, the Deputy Minister, Revenue Canada need only estimate dumping at the P.D. In the USA, all information submitted which is used in a

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procedures does not mean that Canada should follow.

33 It is interesting that in corrosion-resistant steel, Commerce rejects a number of arguments by petitioners, which were subsequently accepted by the Binational Panel (see USA-93-1904-03, October 31, 1994). For detailed discussion of the use of BIA (facts available) where petitioners' information was accepted, see the report of the Binational Panel in *New Steel Rails* USA-89-1904-08, August 30, 1990).

34 In *beer* (NQ-91-002) even very detailed submissions by the Bureau of Competition Policy in support of U.S. respondents were addressed fully by counsel to the British Columbia brewers. In *polyphase induction motors from Brazil* (CIT-5-88), there were detailed representations made by counsel to petitioners which required a conference of both parties before senior Department officials to resolve the issues.

35 Because of their greater access to confidential information, counsel to petitioners in the USA can "second guess" Commerce but it is not clear how much their comments impact the margins calculated. Respondents too may comment and under Commerce procedures will be aware of petitioners' arguments. Revenue Canada does not automatically advise respondents of petitioners' claims, arguments and allegations.

Final Determination must be verified by Commerce. Verification by Commerce is undertaken after the P.D.

- An individual exporter found not to be dumping, or to be dumping at a *de minimis* level (less than 2 per cent), will be excluded from a Commerce investigation. Canada applies the *de minimis* standard on a country basis. Individual exporters at *de minimis* levels will continue to be included in an investigation as long as the country margin is not insignificant (*de minimis*). This is an important difference between Canadian and U.S. administration.

- The Tribunal's approach to determining injury (which involves a staff economic analysis, pre-hearing submissions, filing of evidence, public hearings and extensive testing of the evidence) is quite different than the investigatory approach undertaken by the USITC.[36] However, the frequency of affirmative injury findings is roughly similar.

- The Tribunal's process was consciously constructed, consistent with traditional Canadian policy and direction by the Courts, to ensure that trade-regulating Tribunals would be courts of easy access where small industries or individuals could represent themselves to reduce the cost of compliance. However, when many parties have significant interests at stake and significant monies are involved, much of the pivotal information will be in the confidential record. A self-represented party cannot access the confidential record because they are not represented by independent, specialized counsel. They are at a serious disadvantage without access to the complete record.

- Canada has traditionally focusses more on eliminating injury than the U.S. system, yet like the U.S. system, AD duties that are greater than necessary to eliminate the injurious effects of dumping are often imposed.[37] WTO ADA recognizes more clearly than the previous GATT Codes the interests of consumers and industrial users.[38] This has been reflected in national legislations. It remains to be seen whether, in practice, there will be a real change in practice to take account of these needs. Canada has a seldom used public interest review;[39] the USA does not; however, pressures are building within the USA to

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[36] Both the CITT, through extensive public hearings, and the USITC, by its information requirements and filing procedures, result in heavy costs on participants.

[37] Palmeter, *Report to UNCTAD*.

[38] WTO ADA Article 6.12. SIMA and the CITT Act and rules already envisaged participation by industrial users.

[39] SIMA s. 45 provides for a public interest review. This is done infrequently and in only one case was the duty imposed actually reduced. See CIT Report on Public Interest, *Grain Corn*, (PI-1-87) (October, 1987). The Tribunal's reasoning in *Refined Sugar* (PB-95-002) supporting a decision not to make a recommendation in the public interest suggest that the standards of persuasion are extremely high.

take greater account of the interests of industrial users.[40] Neither the USA nor Canada have a lesser duty rule.[41]

- The retrospective enforcement mechanisms employed by Commerce, i.e., how duties are collected or dumping is eliminated, although favourably modified by the WTO ADA, remain more trade-restrictive than Revenue Canada's prospective approach. Revenue Canada establishes prospective normal values that permit exporters to raise prices to eliminate dumping making payment of antidumping duties unnecessary.

- Under Revenue Canada methodology, importer and industrial users of the dumped product can generally know their costs and liabilities before importation. Under the U.S. retrospective system, the actual liability is not known until the administrative review has been completed which may be two years after importation.

- Revenue Canada does not permit absorption of antidumping duties by related parties, nor their reimbursement in any way. Commerce, however, does not count antidumping duties in its analysis of dumping in related party transactions because the amount of antidumping duty is not knowable at the time of importation. Some users of the U.S. antidumping laws consider this to be a serious weakness in enforcement.

- Canada introduced a sunset review provision in 1984[42] which requires a review or, in the absence of a review, rescission of affirmative injury findings within five years of making them. A review does not mean automatic rescission of a finding. Indeed, some findings remain in place even after two sunset reviews, i.e., they may remain in place for 15 years (or perhaps more) because there is no fixed termination date. Before the WTO ADA, the USA did not have a "sunset" clause. There is now a statutory sunset review provision in 19 U.S.C.A. § 1675(c)1. The USA is taking five years to phase in this new provision. (Canada took the same approach in 1984 when a sunset clause was introduced in SIMA s. 76(5).) It remains to be seen whether the detailed U.S. rules about sunset reviews are a major improvement over U.S. pre-WTO practice.

26. There is abundant anecdotal evidence of heavy compliance burdens and excess zeal by investigators from both countries. Because the U.S. market is much larger, it tends to attract larger volumes of imports. This creates substantially greater workloads for exporters caught up on U.S. investigations. Under the WTO implementing legislation Canada and the USA are moving closer together in their requirements. The USA is adopting some Canadian practices where Canadian practice was more restrictive, for example, the treatment of profits in related party transactions.

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[40] See, for example, General Motors' submissions to the U.S. Administration on WTO Implementation rule-making and the article "Bill Would Allow Commerce To Waive Unfair-Trade Laws", *Journal of Commerce* (December 14, 1995) page 2.

[41] As envisaged in Article 9:1 of the WTO ADA.

[42] SIMA s. 76(5).

Canadian practice with respect to the use of unprofitable sales in calculating normal values will be closer to Commerce practice.

27. It bears repeating that the most significant and important difference between Canadian and U.S. practice is in the enforcement regimes. While the duration of exposure to unliquidated liabilities under the U.S. system has been reduced, it:

- does not decide final liability until well after importation and sale of the goods;
- requires a very onerous and burdensome administrative review on an entry by entry basis;
- these administrative reviews do not apply the more favourable averaging rules envisaged by the WTO ADA.[43] This is a point of contention between Canada and the USA.

28. Revenue Canada operates a prospective enforcement system which usually permits exporters to adjust prices to eliminate dumping so that payment of antidumping duties is not necessary. Exporters selling at normal value are not avoiding payment of antidumping duties; they have raised their prices to eliminate dumping. Periodic reviews focus on a relatively brief, recent period to establish normal values. A somewhat longer investigation period (6 months to a year) period will be used to determine profitability. Retroactive application of antidumping duties in Canada is rare and would normally result from misrepresentation or the exporter's failure to report an important change in circumstances.

29. There are sound policy reasons why Canada as a large, but sparsely populated, trade-dependent country should avoid excessively burdensome requirements and harassment in its administrative practice and procedures. The Government of Canada must encourage and promote the competitiveness of all Canadian firms at home and in export markets. Security of access to export markets and diversification of exports are very important to Canada. Many Canadian manufacturers and exporters are more dependent on imported components and materials than their U.S. competitors.[44] Canadian producers will be less competitive both at home and in export markets if their foreign competitors can purchase parts, intermediate products and materials at lower prices.[45]

30. Protection is a privilege, not a right. Protection[46] transfers revenue from or imposes costs on the general resources of the country to provide benefits to a specific industry or industries. The purpose of antidumping laws is to offset the injurious impact of unfairly traded imports. However, once

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43 Palmeter. Report presented to UNCTAD, 10.

44 Foreign producers establishing a world scale North American production facility may find that a large portion of production of a Canadian plant, often up to 85%, may be exported. A similar sized plant in the USA may export 10-15% or less of its production.

45 Canada's decision to reduce tariffs on auto parts to make Canada a more attractive host to foreign investment are an excellent example of the pragmatism which must be exercised by Canadian policymakers.

46 It may also be argued that antidumping, to the extent that it eliminates the injurious impact of an unfair trade practice, is not protection.

prices are raised to the point where the injury specifically caused by dumping is eliminated, the collection of antidumping duties above that level constitutes an additional and unnecessary tariff/tax on Canadian users (i.e., protection).[47] Such protective/tax burdens, which are superfluous to achieving the object and purpose of the SIMA, must be considered carefully.

31. Because the USA has a much larger economy and domestic market than Canada, the impact of U.S. antidumping actions against Canada will generally be more serious for Canadian exporters than Canadian actions will be for U.S. firms. Because of Canada's much greater relative export dependence, an antidumping investigation would have a greater impact on a Canadian exporter than a U.S. exporter even if Canada and the USA had identical AD laws, regulations and practices. This is a fact of economic life.

32. If Canada is to negotiate more favourable antidumping rules either bilaterally or multilaterally, it must be recognized that many Canadian practices are quite similar to those we are trying to modify. Very significant modifications will be required to create a system that will not burden Canadian exporters disproportionately because of the smaller size of the Canadian market and its relatively greater export dependency. The parties must, of course, address these systems as they now are and not as they were before the of the WTO ADA was concluded.

33. The concerns of those whose exports have been caught up in antidumping investigations must not be trivialized or dismissed. These concerns are real. However, Canadian manufacturers too need protection from dumped and injurious imports. Indeed, because the Canadian market is small, Canadian industries may be more vulnerable to dumping than their U.S. counterparts. A balance must be sought.

34. Those who have been targets of U.S. actions but not of Canadian AD investigations may disagree with parts this analysis and conclusions. Clearly, there have been examples where U.S. "unfair" trade actions go beyond what is needed to do the job and have damaged or eliminated Canadian industry (e.g., *limousines* (USITC Publication 2220, 1989), which was a CVD action where a small Canadian producer was seriously, indeed, mortally harmed notwithstanding the absence of subsidies). The Commerce investigations of *new steel rails* (USITC Publication 2135, 1988) and *OCTG* (USITC Publication 1865, 1986) have had very negative impacts on Algoma and Sysco. However, the failed Canadian action against *cars produced by Hyundai* (CIT-13-87) did not enhance the Korean producer's position in the Canadian market and indeed, was probably a significant factor in its decline. While Canadian decisions have stood up well to Binational Panel reviews, certain aspects of decisions by both the CITT and Revenue Canada have been remanded. Based on the examination of many investigations and extensive personal experience, it is my view that Canadian legislation fulfils its basic purpose as well as does that of the USA. However, the U.S. system of enforcement is more burdensome than Canada's.

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[47] It may be possible to eliminate injury by imposing less than the full amount of the duty (the lesser duty rule).

## I. INTRODUCTION

"This dumping then is an evil and we propose to deal with it"
(Sir William Fielding, (1904))[1]

1. The purpose of this study is to compare the antidumping systems of Canada and the United States, focusing on differences in procedures and practices. The relative effectiveness and impact of each system has also been assessed.[2] As well, the post-Uruguay Round implementation of WTO Antidumping Agreement (WTO ADA) in Canada and the USA was examined and reflected in order to ensure currency of the analysis.

2. In its simplest terms, *dumping* occurs when a firm sells a product in an export market at prices lower than in its domestic market.[3] Over time, this definition has been extended to include exports at prices that do not reflect fully absorbed cost of production plus an amount for profit.[4] This is an important difference from anti-trust law, which addresses price discrimination within the domestic market and sales below variable costs.[5]

3. Increasingly, normal competitive practices in a foreign market are deemed to result in dumping even if the same competitive practices are employed in one's home market.[6] The existence of antidumping laws influences decisions about production locales and can skew the balance of advantages towards the larger market, particularly if the administration and enforcement of antidumping laws in the larger market is more aggressive.[7]

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1 Canada. House of Commons, Debates, *Budget Speech*, (June 7, 1904), 4365.

2 We have not been mandated to recommend changes to the Canadian system and we have not. Rather, our objective is to provide interested parties an improved knowledge base to use in formulating their proposals to the Government of Canada in the anticipated review of SIMA.

3 Peter H. Lindert and Charles P. Kindleberger, *International Economics*, Seventh Ed. ((1982), Richard D. Irwin Inc., Homewood, Illinois), 164.

4 This is made clear in the Uruguay Round Agreement on Implementation of Article VI, General Agreement on Tariffs and Trade (1994) Article 2.2.1. This Agreement is referred to as the "WTO ADA".

5 A U.S. Congressional Budget Office (CBO) report argues that AD laws are protectionist, noting "many groups came to view the laws as an alternative to the escape clause for uncompetitive industries and for those unable to meet the stringent criteria that the escape clause sets for the protection it provides". Source: *U.S., Congressional Budget Office (CBO). "How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy" (Washington, September, 1994), x.*

6 Peter Clark; Presentation to Canadian Importers' Association, Toronto, April 12, 1994.

7 For example, both steel companies, Dofasco and Ipsco, have mentioned this factor in the context of locational decision-making. Locational subsidies at the state level have also influenced these decisions.

4. Canadian businesses have expressed concern about the trade-inhibiting effects of U.S. trade remedy laws. These problems are very real for a country like Canada that is heavily dependent on exports, particularly to the USA. At the same time, these firms, and others, ask whether Canada's trade remedies legislation and administrative practices provide the full relief envisaged by the relevant provisions of the WTO, and whether Canadian producers receive the same degree of protection under their own laws as do producers in the USA or Europe.[8] A case in point is the 1992/93 investigations of flat-rolled steel products by Canada and the USA. Canadian steel producers argue that U.S. antidumping law and practice is more protectionist than Canada's.[9] They have also expressed concern about Mexican practices and have urged they be examined by a WTO review panel.[10]

5. The rules for determining dumping have become increasingly complex.[11] In addition, many view as anomalous the existence of antidumping systems in a Free Trade Area that aims to create an integrated market. However, since the Canada-United States Free Trade Agreement ("CUSTA") entered into force, antidumping actions initiated by Canada and the USA against each other's imports have not disappeared. Since entry into force of CUSTA, there have been 11 U.S. investigations involving Canada and 25 Canadian AD investigations involving U.S. exports. However, there have been no investigations[12] of Canadian exports since NAFTA entered into force, while 5 Canadian AD investigations involving U.S. exports were initiated.

6. This track record is probably because the relatively smaller size of the Canadian market creates more difficult adjustment problems and similar volumes of imports have a greater impact on producers in Canada.

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[8] Perceptions of antidumping laws tend to be subjective and even emotional. No businessperson welcomes auditors from any government agency, domestic or foreign. Antidumping investigations are disruptive, time-consuming and expensive. However, Congress or Parliament legislates certain levels of tariff protection for a domestic industry; there is an argument that foreigners should not be able to unilaterally and without consultation undermine that protection in a way that injures the industry that Parliament or Congress intended to protect.

[9] This is not a study of bilateral or multilateral steel trade. It addresses the administration of antidumping law over a broad range of commodities, including steel. However, it should be observed here that the Canadian Steel Producers' Association (CSPA) had detailed written comments about their concerns, which are reflected herein. Several U.S. firms and other exporters to North America, including integrated steel producers, about their experiences with North American (including Mexican) antidumping laws.

[10] See "Mexico Slaps Antidumping duties on Canada", *Globe and Mail*, (January 3, 1996).

[11] CBO Report, ix (see note 5) - "U.S. antidumping law is now a tangled and confusing subject".

[12] See Jeffery Garten. Notes for Remarks to the International Chamber of Commerce, (Washington, D.C., April 7, 1994), 29. Mr. Garten commented that:

> "As we have seen with Canada, as the economies become more integrated we expect the use of the antidumping law among NAFTA members will decline."

7. This study passes no judgement on whether antidumping laws, *per se*, are good or bad. There have been numerous articles in recent years claiming that the dumping laws have gone beyond their original intent of addressing predation.[13] This view of antidumping law has been so often repeated in recent years, it has become, or is rapidly becoming, conventional wisdom. However, antidumping laws now serve essentially the same purpose as they did when they were introduced - to deal with the injurious price discrimination practices of foreigners.[14]

8. The study contains a history of antidumping laws in Canada and the United States in order to illustrate the evolution of AD systems.

9. The basis of the current Canadian and U.S. AD system is found in the 1904 Canadian legislation. This early Canadian system was imitated by Australia (1906) and South Africa (1914). The Canadian law was viewed by Congress in 1919 as the proper way to deal with the problem of foreign price discrimination.[15] The 1916 U.S. law that was designed to deal with predation[16] was described as "more or less ineffective",[17] and was replaced by a Canadian-type system.

10. The U.S. Tariff Commission noted that the 1916 U.S. Act[18]

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[13] *Predatory pricing* is the practice of systematically selling a good [or service] at a loss in order to drive competitors out of the market and thereby increase the market power of the predatory firm, allowing the firm subsequently to raise prices above the level that prevailed before the predatory pricing began.

[14] The only antidumping law specifically designed to address predation was the U.S. Antidumping Act of 1916. The House of Representatives in Report No. 479 (December 8, 1919), which led to the design and implementation of the current U.S. law, indicated the purpose of the antidumping legislation (proposed in H.R. 1091.8) was:

> "to prevent the stifling of domestic industries by the dumping of foreign merchandise at less than its fair value in the country of production". The Sherman Act (15 U.S.C.A. 1.26 1 Stat 209).

However, the Supreme Court in *American Banana* v. United Fruit Co. (213 U.S. 347) (see CBO Report, 18-19 and cite to Viner, *Dumping*, 240) (see chap. 2, note 9) held that the United States had no jurisdiction under the Sherman Act over acts occurring in other countries (CBO Report, 18).

[15] While there are references to deleterious impacts of dumping on local producers in the legislative history in both Canada and the USA, none of these early laws, other than the 1916 U.S. Act, contemplated an injury test.

[16] Garten, *Notes for Remarks*, 6 (citing H. Report., 479160 Cong., 2nd sess.). Garten reports a number of instances in the early years of the 20th Century when U.S. industries were forced out of business by dumping practices which appear to have been predatory.

[17] CBO Report, 2.

[18] The law enacted by the Congress of the United States under the heading of "Unfair Competition" of the Act of September 8, 1916 is not the basis of current antidumping regimes in North America. It never was an effective mechanism for addressing the most

> "apparently fails where the Canadian laws succeed, in not contemplating, in reasonable cases the prohibition of sporadic dumping since its penalties apply only to persons who `commonly and systematically import' foreign articles, and providing that such importation must be made with intent to injure, destroy or prevent the establishment of an industry in this country or to monopolize the trade and commerce in imported articles. Evidently, for the most part, the language of the act makes difficult, if not impossible, the conviction of offenders and, for that reason, the enforcement of its purpose".[19]

11. Arguably, concerns about differences in administration and impact of AD systems ought not to exist, since all countries who are signatories to the WTO should have very similar antidumping systems, based on the WTO Antidumping Agreement (WTO ADA). That is, their laws should be quite similar in both their provisions and their practices in their impact. However, it is apparent from even a cursory review of the antidumping systems of the four major users of antidumping laws[20] that there are important differences in practice and procedure. These differences suggest that the GATT/WTO Codes have been carried into domestic legislation differently and with varying degrees of fidelity to their terms, principles, object and purpose. Differences in implementation and administration of antidumping laws have been the subject of very intensive on-going negotiations, most recently during the Uruguay Round. Administrative zeal can be an important source of problems and perceived differences. However, excess zeal is not something easily codified or disciplined.

12. Notwithstanding intensive negotiations in the Kennedy and Tokyo Rounds, important areas of

(..continued)

> prevalent types of dumping. Predation was never the real purpose of Canadian AD law, although one might so conclude from reading Finance Minister Fleming's 1904 Budget Speech. Rather, the Government of Canada introduced a measure which could deal with low pricing while avoiding a general tariff increase:
>
> > "Our friends on the other side of the house will recognize this dumping evil as fully as and perhaps more fully than even gentlemen on this side of the House. We differ from them as to the manner in which it should be dealt with. Their remedy is a general increase of the tariff all along the line. Perhaps they would not go quite so far as to increase all duties but that is the principle they suggest. A high tariff is their remedy for this evil. We object to that because we think it is unscientific. The dumping condition is not a permanent condition, it is a temporary condition and therefore it needs only a temporary remedy, that can be applied whenever the necessity for it arises."
>
> *House of Commons, Debates*, June 7, 1904 at 4366.

[19] *Ibid.*, 2.

[20] Traditionally, the USA, Canada, the European Economic Community (hereinafter referred to as the European Union, or E.U.), and Australia have been the major users of antidumping laws. However, many more countries are beginning to use antidumping laws to protect their domestic producers and in some cases, to respond to the antidumping actions of others.

AD practice remained uncodified, permitting great disparities in the application and administration of antidumping systems. One such critical area was causality or the requirement to establish and demonstrate a linkage between the finding of material injury and dumping.[21] Another was "standing" or who has the right to bring a complaint. Recent GATT Panel decisions and changes reflected in the WTO ADA attempt to remedy deficiencies and narrow differences.[22]

13. The USA, Canada, Australia and the E.U. have been among the most frequent users of antidumping laws.[23] The spread of antidumping systems to many new users has been encouraged by the reduction of tariff barriers and other trade measures as the more economically advanced developing countries open markets that heretofore have been highly insulated from foreign competition.[24] New users of AD laws include Mexico, Brazil, Korea, Japan and the Philippines. Some, like Mexico,[25] may have introduced antidumping laws as a defensive mechanism.[26] This

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[21] The Code requires that the material injury necessary to impose AD duties must be caused by the dumped imports through the effects of the dumping. It has been argued that this means that the dumping by itself must cause injury that is material in degree. However, some USITC Commissioners and some CITT panels establish first whether an industry is being materially injured and then determine whether or not the dumped imports have contributed in any way to the injury. This latter view is not supported by the WTO ADA.

[22] The USA had been challenged pre-WTO for not taking affirmative steps to confirm that U.S. complainants truly represent a major portion of U.S. production of the goods at issue. GATT Panels have ruled against U.S. practices but the reports have not been adopted.

[23] GATT reports that since 1980 these countries have initiated some 1000 investigations - and over half have resulted in the imposition of AD or countervailing (CV) duties. In both Canada and the USA, recourse to the antidumping remedy has been particularly important to steel producers, and in recent years, the Canadian antidumping system has also been applied frequently against imports of agricultural products (apples, potatoes, onions). However, WTO reports suggest that Mexico and Brazil have become very active.

[24] For example, the WTO Safeguards Code will eliminate grey measures and could lead to increased use of the selectivity available in the WTO AD/CVD Agreements of the undertaking provisions of these laws as a way to replace them.

[25] Recent U.S. and Canadian targets of the Mexican AD system claim that it initially went far beyond being defensive. While Mexican AD procedures were reported to be more difficult, less transparent and far more arbitrary than those employed by either Revenue Canada or the U.S. Department of Commerce, there appears to have been some improvements since Mexico became a Party to the NAFTA. According to Canadian targets there is much still to be done.

[26] See CBO Report, xi, where it is claimed that other countries are targeting U.S. exports in retaliation for U.S. use of AD laws. These countries too must follow the WTO ADA. One of the most interesting aspects of the proliferation of AD laws has been the development of mirror clauses, whereby the invoking country inserts in its legislation a clause permitting it to adopt another country's (more rigorous or restrictive practices) when investigating that other country. An important element of this reciprocal treatment policy is that the country subjected to its own law and practice cannot credibly complain about such treatment.

does not mean application of AD law by these new countries is any less burdensome. Indeed, because of different legal and administrative systems, North American exporters may find these systems more arbitrary than those closer to home. Because many new users are adopting systems based on the E.U. model where the constabulary and the judiciary are the same, transparency may be less than ideal. But if the USA and Canada do not make their own systems less complex and restrictive we need not expect others to modify their own practices.

14. The most important antidumping actions initiated by the USA against Canada in recent years have been *flat-rolled steel products*, *potassium chloride* (potash), *oil country tubular goods* (OCTG) and *magnesium*. An excellent discussion of the impact of U.S. antidumping actions against Canada can be found in *U.S. Trade Remedy Law: A Ten Year Experience*.[27]

15. Canada has in turn initiated investigations and imposed antidumping duties on important U.S. exports, including *corrosion-resistant steel sheet*, *cold-rolled steel sheet*, *carpets*, *gypsum board*, *refined sugar* and *beer*. But there have been important "no injury" findings as well. Imports from the USA of dumped *carbon steel plate* and *hot-rolled sheet* have been found to be non-injurious by the Tribunal. Canadian exports of *hot-rolled* and *cold-rolled steel sheet* have been found non-injurious by a majority of the Commission.[28]

16. Since the entry into force of the Canada-United States Free Trade Agreement (CUSTA) in 1989, antidumping duties have been imposed more frequently by Canada on imports from the USA than by the USA on products from Canada and since the entry into force of NAFTA, no U.S. antidumping actions involving Canada have been initiated.[29]

17. Of the 15 undertaking arrangements that have been concluded under the Special Import Measures Act (SIMA) since 1984, nine have involved imports from the USA. In most of these undertakings, the U.S. exporters have agreed to cease dumping.[30] That is, they agreed to follow Revenue Canada's directions about pricing at normal value, foregoing the cost and uncertainty of the injury inquiry. Some, in our experience, are pleased to be able to tell their Canadian customers that the Government of Canada (GOC) will not allow them to sell to Canada at prices lower than those in the USA.

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[27] U.S. Trade Relations Division (UET), Department of Foreign Affairs and International Trade (March, 1994).

[28] Canadian International Trade Tribunal (CITT) *Carbon Steel Plate*, (NQ-92-007); and CITT, *Hot Rolled Sheet*, (NQ-92-008).

[29] The last A.D. action, *Wire Rod*, was initiated in May, 1993. It was subsequently withdrawn by the petitioners.

[30] There was one undertaking designed to eliminate injury from dumped imports from the USA that was precipitously terminated (Revenue Canada Statement of Reasons, July 1993) at the request of an importer, resulting in an injury finding. (See CITT *Preformed Fibreglass Pipe Insulation* (NQ-93-002).)

18. The study identifies the differences in approach between the Canadian and U.S. systems in calculating dumping and determining "material injury".[31] However, it should be noted at the outset that the decision records of the United States International Trade Commission (Commission) and the Canadian International Trade Tribunal (CITT and Tribunal) suggest that, on a broad basis, neither country finds material injury less frequently than the other.[32] There are, however, problems inherent in such a broad statistically based analysis because of the differences in administration, market size, competitive conditions and the point in time at which the measurement is made.[33] Neither the time nor the information base to analyze these qualitative factors was available. Thus the statistical comparisons as a measure of either the effectiveness or overzealous application of either system have limited value.

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[31] This study analyzes:

- ease of access to the legislation;
- complexity;
- cost of compliance;
- administrative discretion;
- scope for protectionist application of rules; and
- final results.

[32] As a general rule of thumb, the CITT and predecessor tribunals have found no injury in final inquiries in about 30 per cent of final injury inquiries. For the USITC experience see Appendix A.

[33] For example, over the last two years, the Tribunal has issued decisions involving imposition of duties in virtually all cases. The USITC has, on the other hand, found both ways.

## II. EVOLUTION OF ANTIDUMPING SYSTEMS

1. Some of the drafters of early antidumping laws focussed on the unfairness of the practice - the unilateral decision by foreign exporters to cut prices in order to offset tariff protection, taking market share away from producers in the importing country. Recent conventional wisdom is that such laws were originally designed to address predation. However, it has been clear for many years that the real objective of AD laws is broader than predation. Rather, it is to offset the injurious effects of international price discrimination (dumping). The intent of the dumper had become an irrelevant consideration. However, in recent years the conditions (closed home markets and cartelization) which permit dumping have gained increased attention.[1]

2. Over time, AD systems evolved to include an express requirement that dumping should not be actionable unless it was demonstrably causing injury to production in the importing country. However, for decades after antidumping laws were introduced, there was no formal determination of injury. The USA has applied formal injury tests since 1954. In Canada, there was no formal injury test until 1968.

3. It is important to remember that GATT (1994) Article VI *condemns dumping only if it is injurious*. Rodney Grey stressed that antidumping systems must not be used to harass legitimate trade.[2] Canada hoped to avoid frivolous or unwarranted application of antidumping duties by requiring that an inquiry into injury be conducted by an independent Tribunal that was "quite prepared to find injury if it exists and quite prepared to find no injury where none exists".[3]

4. The USA has required independent reviews of injury matters since 1954. However, even U.S. agencies claim the material injury standard in the USA is at the point where "almost any harm that is not negligible is considered to constitute material injury".[4] Canada chose in 1968 to establish a quasi-judicial body to address the injury issue.[5] The current injury determining body, the Canadian International Trade Tribunal (CITT) appears in some recent cases to have adopted a standard that dumped imports need only be a cause of injury and not that the dumping caused material injury in and of itself.[6]

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1 Garten, *Notes for Remarks*, 11-13.

2 Rodney de C. Grey, *The Development of the Canadian Antidumping System*, Private Planning Association of Canada, (1974), 8.

3 *Ibid.*, 14.

4 CBO Report, 3.

5 Prior to this, Canada had argued that there was an injury element to Canadian law because AD duties applied only to goods that were of a class or kind made in Canada.

6 See CITT, *Certain Corrosion-resistant Steel*, (NQ-93-007). Confusion about the actual standard may arise because the Tribunal looks first to injury then to causality.

5. The choice had been made between unfettered action against dumping and the selective provision of a remedy against injury caused by the practice. As explained by Mr. Justice Jackett in *Magnasonic*:

> "It appears clear, however, that the reason for the existence of the Tribunal was that Parliament sought, not only a means whereby to keep out dumped goods when their importation would do injury or retard production, but also a means whereby dumped goods would not be kept out when their importation would not do injury or retard production (and would, therefore, presumably provide Canadian customers with cheaper goods without doing any harm). Otherwise, that is, *if Parliament was not concerned about the danger of keeping out dumped goods unnecessarily, the statute would have simply prohibited all importations of dumped goods*."[7] (emphasis added)

6. Although dumping in the technical sense is a widespread practice, which is only condemned when it is injurious, "dumper" is a pejorative characterization of a person or firm that engages in unfair trading practices. There are still those who favour penalizing dumping without regard for whether or not it causes or threatens injury in any degree. This is a throwback to the period when antidumping legislation was not disciplined by WTO rules nor by injury tests.

7. As early as 1791, when Alexander Hamilton wrote about his concerns in this area, predatory motives were attributed to those who engaged in dumping.[8] Professor Jacob Viner in his classic work, which explores the evolution of antidumping systems throughout the world, lists the following motives for dumping:[9]

| | **Motive** | **Continuity** |
|---|---|---|
| A. | To dispose of a casual overstock | Sporadic |
| B. | Unintentional | |
| C. | To maintain connections in a market in which prices are on remaining considerations unacceptable | Short-run or intermittent |
| D. | To develop trade connections and buyers' goodwill in a new market dumped on | |
| E. | To eliminate competition in the market dumped on | |

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[7] Canada. Federal Court, *Magnasonic Canada Ltd. v Antidumping Tribunal* [1972] FC 1239, October 5, 1972, 30 D.C.R. (3d), 125/126.

[8] See Alexander Hamilton, *Report on Manufactures* (n.p., 1791). (Hamilton was concerned about "bonusing" or subsidization of exports by cartels or powerful European interests. Lower export prices were "subsidized" by high profits generated within the exporter's sphere of influence. While this may appear to be a *subsidization issue*, the problem was dumping or price discrimination. This issue was the subject of much discussion and debate during the 19th century.)

[9] Jacob Viner, *Dumping: A Problem in International Trade* (Reprinted in 1991 by Augustus M. Kelly, Publishers, Fairfield, NJ), 23.

| | Motive | Continuity |
|---|---|---|
| F. | To forestall the development of competition in the market dumped on | |
| G. | To retaliate against dumping in the reverse direction | |
| H. | To maintain full production from existing plant facilities without cutting domestic prices | Long-run or continuous |
| I. | To obtain the economies of larger-scale production without cutting domestic prices | |
| J. | On purely mercantilistic grounds | |

8. In the post-World War II period, trade expansion became an important foreign policy tool.[10] After the Great Depression and WWII, protectionism was blamed for reduced economic activity. Trade liberalization was used to rebuild broken economies and restore prosperity. This environment led to the evolution of rules about the importation of antidumping duties that have made it more selective and less automatic before they became more complex and restrictive.

9. The current international rules about the imposition of antidumping duties are Article VI of the GATT (1994) and the WTO ADA. From the outset, Article VI limited protection against dumping and subsidization to those situations where the practices caused or threatened injury to producers in the importing country.

10. Governments have begun to understand and accept that legitimate trade should not be interfered with except for good reason. For example, if fairly-traded imports were causing serious injury to producers in the importing country, the level of pain necessary to justify action is much higher (serious injury). Further relief from import competition is temporary, should be accompanied by adjustment and may, unless proper procedures are followed, require compensation. Thus there is a general escape clause in GATT (1994) Article XIX to address serious injury from fairly traded imports. There is a derogation from GATT (1994) in Article VI to address material injury from imports benefitting from government subsidies and/or dumping. These safeguard provisions are very hard to use. The purpose of the escape clause is to give the domestic industry breathing room

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[10] See Harald B. Malmgren, *Trade Wars and Trade Negotiations* (Non-tariff Barriers and Economic Peacekeeping), The Atlantic Council of the United States (1970), 9.

With considerable foresight some 25 years ago, Ambassador Malmgren noted:

> "What has happened to this conception of trade negotiations as part of a broader political design? At least part of the reason is that trade policy was seen as an instrument of security policy and preservation of the multilateral trading system for its own sake was a secondary consideration - with the receding threat of a major Cold War confrontation in Europe and without a new rationale for trade policy, the question of trade, became a technical question for relatively low-level technical officials. No international problems of broad dimensions can be solved by technicians, unless they have the aid and attention of top-level foreign policy officials".

in which to adjust to increased competition.[11] AD laws do not have the restrictive provision that protection is only granted temporarily to facilitate adjustment.[12]

11. Neither Article VI, the ADA nor the AD legislation of major users examine, assess or concern themselves with the motivation of the dumper. The drafters of the Code did not want to try to read the minds of exporters or companies that practised dumping. As noted above, we find, that in public and academic discussions of dumping, particularly in the USA, there has been an increasing focus on the effects, closed markets, cartels and abuses of marketing power.[13] However, dumping is also practised from open markets such as Hong Kong and in highly competitive industries like footwear and clothing.

12. The GATT and the WTO ADA do not prevent or prohibit dumping as such. Their object and purpose is to discipline the injurious impact of dumping. Rodney Grey explained during the debate about Canada's implementation of the original GATT Antidumping Code that dumping "is a very common commercial practice and according to international rules it is to be condemned only if it threatens injury".[14] Rather, the WTO ADA and (hopefully) antidumping laws are designed to prevent or remedy material injury that is caused or threatened to industry in the importing country.

13. As normal customs tariffs applied at the border became less important in regulating trade flows, manufacturers and agricultural interests shifted their attention to what have become known as contingency protection systems or trade remedy laws, the most important and most frequently used being AD duties. More and more, it appears that the legislators and administrators may have forgotten that AD systems are in effect a limited derogation from WTO rules, which are normally designed to achieve trade liberalization and secure market access. They are to be used only to ensure that dumping is not injurious. The intent and administration of these laws have been skewed to meet the protectionist demands of special interests. This does not mean the systems are totally unbalanced or biased against exporters. But there have been industry-specific provisions legislated in the USA. It is clear that there are a number of provisions in SIMA that addressed the concerns of the capital goods industry. In the last 10 years, that industry has been an infrequent user of the SIMA.[15]

14. Antidumping laws are complex. They do not lend themselves to quick or simple analysis. Antidumping investigations and the imposition of AD duties can create anomalous situations in free trade areas. Producers located close to each side of the border, who may be less than 100 kilometres

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11 CBO Report, ix.

12 *Ibid.*, xi.

13 Garten, *Notes for Remarks*, 11-13.

14 Testimony of Rodney Grey to the Commons Standing Committee on Finance Trade and Economic Affairs, October 29, 1968, Minutes of Proceedings and Evidence No. 3, 48.

15 See House of Commons, Debates, (May 23, 1984), 3969. The Minister of State (Finance), the Hon. Roy MacLaren, advised the House that the Act and Regulations contained provisions that would deal with many of the specific problems of the capital goods industry.

apart, are very limited in their ability to match prices in a market downturn if their prices go below fully absorbed cost of production.[16] Freight absorbtion[17] can be a problem if the amount of freight absorbed on exports is greater than in the home market. Sales made at the same price to customers operating in both markets can and have resulted in findings of dumping at both the DOC and Revenue Canada. However, our task is to address the relative effectiveness of Canadian and U.S. legislation in dealing with such situations, not to pass judgment on the logic, if any, of the anomalies that may arise. It is for governments to address such concerns.

15. AD systems have become much more complex, with detailed rules about how to calculate dumping margins.[18] Why? The answer is to be found partly in the fact that business has become more globalized and more complex. Twenty-five years ago, Rodney Grey predicted that with the increasing internationalization of transactions, particularly among transnational corporations, dumping was likely to become more prevalent in international trade, but it was not likely to become easier to detect.[19] These concerns arose out of practices referred to by the drafters of the ADA as

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[16] See *Soda Ash* (ADT-7-83) where the Tribunal stated that the Canadian industry

> "... could anticipate that competitors would follow [prices down] but it was entitled to assume that its competitors would not cross the line into injurious dumping". Reasons (July 7, 1983) 12.

[17] See Garten, *Notes for Remarks*, 22, where he explains that "Location is a comparative advantage".

[18] In Canada, dumping occurs where the "normal value" of goods like those exported to Canada exceeds the export price of goods sold to Canada. Normal value is conceptually the selling price of like goods in the exporters' home market, adjusted to create an "ex-factory" price at the same level of trade and in similar quantities (s. 15 and s. 16 of SIMA). Where there are no comparable sales, or where the preponderance of home market sales are made at a loss, normal value is constructed based on the cost of production of the goods, plus general, selling and administrative costs, all other costs, and an amount for profit (s. 19(b) of SIMA) calculated with respect to the like goods in the country of export. There is provision in SIMA for an exporter's sales to a third country to be used for the determination of normal values, though the Deputy Minister does not use this method (s. 19(a) of SIMA). Export price is essentially the selling price to Canada of the goods less adjustments, for costs incurred in the exportation of the goods, to establish ex-factory price for comparison to normal values (s. 24 of SIMA). It is in its simplest terms the lower of the price paid by the importer and the amount received by the exporter. Where the importer of the goods is an "associated person" to the exporter, the Deputy Minister, may choose to employ the selling price to the first unrelated party in Canada, less certain prescribed adjustments (s. 25 of SIMA). There are special rules that have been used in the past dealing with exporting countries that have non-market economies (s. 20 of SIMA) that involve establishing normal values using third country comparisons.

[19] Grey, *Testimony to the Commons*, 7.

"hidden dumping" among associated houses.[20] Some of the most complex provisions of Canadian and U.S. AD laws address such transactions.[21]

16. With the increase in the number of joint ventures and multinational corporations, it is not unusual for investigating authorities to encounter elements of cross-ownership and non-arm's length relationships in virtually every antidumping proceeding that the Department conducts.[22] In this regard, Patrick Messerlin, who has written several interesting articles on dumping, notes:

> "It must be recognized that the computation of `constructed values' is an impossible task in a world dominated by flexible multinational firms".[23]

17. Messerlin also argues that agencies charged with enforcing antidumping rules "should only consider observed prices".[24] However, while their ability to construct values is challenged by the complexities of transactions, corporate relationships and strategic alliances, administering authorities are moving quickly to adapt to and cope with this ever-changing environment.

18. Commerce legal staff noted in an article on treatment of related-party transactions:

> "Often, the Department encounters related parties that are vertically integrated with respondents in banking, distribution, design, transportation, insurance, and other miscellaneous services. To add further complexity to these proceedings, there are few products that are manufactured exclusively in one country. Quite often, products have value added by related subsidiaries operating in several different countries. Thus, each proceeding seems to bring a new permutation that the Department must consider in evaluating relationships and in determining the appropriate treatment of transactions between related parties."[25]

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[20] See *inter alia* GATT Document TN.64/WTB/W/12 22 June 1966.

[21] SIMA s. 25 and the ESP provisions of U.S. law 19 CFR § 353.41(e).

[22] This description designates the Import Administration, International Trade Administration, Department of Commerce in the USA, and the Antidumping and Countervailing Duty Division, Revenue Canada. McDevitt, Ringel, Terpstra, *Recent Developments in the Department's Handling of Related Parties,* The Commerce Department Speaks 1992, supplement to volume 1, (October 1, 1992), 2.

[23] Patrick Messerlin, *Antidumping*, in Completing the Uruguay Round, edited by Jeffrey J. Schott, (Institute for International Economics 1990), 121.

[24] *Ibid.*, 121.

[25] McDevitt, Ringel and Terpstra, *Recent Developments*, 3.

**The Uruguay Round**

19. At the outset of the Uruguay Round, many countries shared the view that the U.S. AD system was administered in an overly zealous and trade-chilling manner and that it was too easy for U.S. producers to initiate very disruptive investigations. Others, including Canada and the USA, felt that the E.U. used their system for imposing antidumping duties in a non-transparent and restrictive way or as leverage to negotiate trade restrictive undertakings. Japan and others while sharing the concerns noted above, were also concerned about the E.U. anti-circumvention or "screwdriver" rules, which were designed to prevent a shift in trade to parts of products subject to dumping orders that were easily assembled (i.e., with a screwdriver) inside the E.U.[26]

20. Canada had come under criticism by its trading partners for:

- lack of transparency in determining dumping;
- the use of artificially high profit margins in constructed cost calculations;
- absence of a meaningful preliminary injury test; and
- very restrictive procedures for suspension of antidumping investigations by acceptance of undertakings (which required, among other things, that they could not be accepted after the making of a Preliminary Determination).[27]

21. The WTO ADA also contains vague wording that was no doubt necessary to achieve consensus. Vague wording such as "generally", "significant", "unreasonable" and "distorting", which is open to differing interpretations, have led to different administrative practices and continuing disputes. These compromises on wording may lead to further disputes among the signatories if there are significant differences in the way the WTO ADA is reflected in domestic legislation.[28]

22. Where the changes in the WTO ADA have amended current law and practice in the USA or Canada, these changes and their potential implications for relative effectiveness of each regime have been addressed.

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[26] Garten, *Notes for Remarks*, 23, indicates that the WTO ADA permits Commerce to continue to enforce the legislative measures introduced in 1988 to address circumvention. Canada disputes this arguing that since the WTO ADA did not address anti-circumvention there has been no sanctioning of U.S. practice.

[27] Canada agreed during the Uruguay Round to change its restrictive practices related to the acceptance of undertakings. Article 8.2 of the 1994 ADA provides that price undertakings shall not be sought or accepted unless there has been a preliminary affirmative determination of dumping. This is now reflected in SIMA s. 49(2)b.

[28] See Garten, *Notes for Remarks*, 29. "As vigilant as we will be with our own legislation, we will be reviewing other countries' laws for consistency with the agreement."

23. Canada and other countries[29] have, through experience, learned to be wary of how the USA implements GATT obligations into domestic law. The U.S. record since the Kennedy Round[30] is reason enough to be wary of vague or imprecise commitments and explains why it was necessary to introduce "fast track" approval procedures in the Trade Act of 1974.[31]

24. To suggest that the WTO ADA significantly liberalized AD rules in either Canada or the USA is excessively charitable. The CBO concluded that neither the House nor the Senate version will significantly change the overall stance of U.S. law.[32] There are a number of useful changes arising out of the WTO ADA which have been included in U.S. law (e.g., standing, averaging startup and non-recurring costs and, while we are not certain of the value, sunset review). Implementation of WTO rules about sunset reviews has been grudging and carefully circumscribed. Many elements of U.S. practice have been codified (and adopted by Canada and by others).

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[29] See interview with H.E. Nobutoshi Akao, the Japanese Uruguay Round negotiator - *Inside U.S. Trade*, Special Report (December 24, 1993): 7

> "...at the same time everyone knew that antidumping was critically important for the U.S. and if all the U.S. proposals were rejected without any favourable consideration, then perhaps the Uruguay Round package would be dead on arrival in Congress."

[30] Seemingly reliable commitments have lost considerable value (or disappeared) in implementation. Failure of the U.S. Congress to implement their obligations relating to the "American Selling Price" system of customs valuation, and failure to introduce a clear definition of material injury into the U.S. antidumping statute after the Kennedy Round, are examples that highlight the need to have commitments spelled out in detail.

[31] Experience in trying to extend NAFTA to Chile have underlined the importance of fast track procedures.

[32] CBO Report, xiii.

## III. HISTORY OF NORTH AMERICAN ANTIDUMPING SYSTEMS

1. The original proponents of antidumping laws argued they were needed counteract the real or perceived threat of predation through international price discrimination.[1] There was a perception among the targets of dumpers that price discrimination was meant to put them out of business. In the Americas, the targets were the smaller emerging firms or industries in the USA and Canada. The predators were the longer established and better organized industries of Europe.

2. In 1904, Canada considered Britain to be a clean player in the trade game, but not Germany.[2] Indeed, in 1903, Canada imposed a special surtax on imports from Germany because that country "had not treated us as fairly as we ought to be treated".[3] The focus of this defensive response appears to have been sugar, where German exports to Canada within a year declined from 174,000,000 pounds to "not a pound".[4] This special surtax reduced imports from Germany by 38% and shifted Canadian imports of sugar from Germany to the West Indies. It is interesting that a U.S. countervailing duty law introduced late in the 19th century also addressed subsidized imports of sugar.

3. Notwithstanding this preoccupation with predation, at least in the current analysis, it was some time before it was required that it be shown that dumping caused or threatened material injury as a precondition for imposing AD duties.

### Canadian History

4. Finance Minister Sir William Fielding introduced antidumping duties to Canada, and to the world, in his June 7, 1904 Budget Speech. Sir William spoke of the evils of *dumping or slaughtering* which he described as the practices of foreign trusts and combines in high tariff countries, designed to eliminate competition in neighbouring markets:

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1 *Predatory pricing* is the practice of selling a good [or service] at a loss in order to drive competitors out of the market and thereby increase the market power of the predator firm, allowing the firm subsequently to raise prices above the level that prevailed before the predatory pricing began.

There are other views, however. See J. Michael Finger, *The Origins and Evolution of Antidumping Regulation in Antidumping: How it Works and Who Gets Hurt*, edited by J. Michael Finger, (University of Michigan, 1993), 13-14, in which he states that when one sets aside the political rhetoric, dumping has from the earliest days been what it is today, simple protectionism.

2 A century earlier, Alexander Hamilton did not have the same view of the British. He urged the building of high tariff walls against them.

3 Sir William Fielding, *Budget Speech*, 4350.

4 *Ibid.*

> "We find today that the high tariff countries have adopted that method of trade which has now come to be known as slaughtering, or perhaps the word more frequently used is dumping; that is to say, that the trust or combine, having obtained command and control of its own market and finding that it will have a surplus of goods, sets out to obtain command of a neighbouring market, and for the purpose of obtaining control of a neighbouring market will put aside all reasonable considerations with regard to the cost or fair price of the goods; the only principle recognized is that the goods must be sold and the market obtained... *This dumping then is the evil and we propose to deal with it*."[5] (emphasis added)

5. These practices, *dumping or slaughtering*, according to analysis by the Government of the day, accounted for ninety (90) per cent of complaints from Canadian manufacturers. It was estimated that the average dumping margin was 15 per cent.[6] The maximum rate of special or antidumping duty in the earliest version of Canadian antidumping laws was set at 15 per cent.

6. Sir William recognized that dumping could benefit consumers but argued that possible benefits to consumers were outweighed by the costs to import-competing industries. Furthermore, in his view there could be no guarantee that the low prices would continue if there were no domestic industry to compete with the dumpers. The Minister noted:

> "... with the Canadian industry crushed out what would happen? The end of cheapness would come and the beginning of dearness would be at hand".[7]

7. At that time there were a significant pressures on the Canadian government, from Canadian manufacturers, to increase tariffs.[8] Farmers, on the other hand, were unhappy with the existing

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[5] Sir William Fielding, *Budget Speech*, 4365. Soon after Canada, both Australia and New Zealand passed antidumping laws. By 1921, the USA, France, Great Britain and most British Commonwealth countries had antidumping laws in place: Finger, 16.

[6] *Ibid.*, 4364-69, 4373-74.

[7] Sir William Fielding, Budget Speech, 4365.

[8] Canadian steelmakers, in particular, were pressing for higher tariffs on steel rails.

> "As Canada's westerns plains were opened up to immigrants, Canada's first transcontinental railroad, completed in 1885, was earning attractive profits, and railroad building in Canada began to surge. The *U.S. Steel Corporation*, recognizing an opportunity, set out aggressively to sell steel rails to Canadian railroaders. Canadian steelmakers alleged that U.S. Steel was unfairly aggressive and was dumping rails into the Canadian market.
>
> It would have been very difficult for the Canadian government to limit any tariff increase to steel rails. Like in other countries, tariff making in Canada was not a discriminating process. Once the tariff was opened for revision, all the producers to which the government owed a political debt would come forward; the tariff increase would spread to other iron and steel products, to textiles, to farm equipment, and on and on."

tariffs, which they viewed as a benefit to Eastern Canadian industry and a cost to farmers in general and Western Canadian farmers in particular. Sir William's was a selective approach, an alternative to raising tariffs across the board.[9] It provided selective and limited protection to Canadian manufacturers facing aggressive import competition, often because of surplus production being dumped into the Canadian market. Thus, the passage of the antidumping provisions provided the Canadian government a suitable compromise.

8. However, Sir William also stressed the importance of not interfering with fair trade. Indeed, the new special duties would not apply to goods of a class or kind not made in Canada - which addressed some of the needs of producers dependent on imported parts or materials but did little for infant industries. However, in 1904, there were no constraining GATT rules and dispute settlement panels to discipline the use of trade restrictive measures. The Minister could and did introduce hefty tariffs to protect new industries or new products of existing industries.

**Section 6 of the Customs Tariff**

9. The substance of the Canadian antidumping statute was captured in the first paragraph of Customs Tariff section 6 as follows:

> "Whenever it appears to the satisfaction of the minister of customs ... that the export price ... is less than the fair market value thereof, as determined according to the basis of value for duty provided in the Customs Act ... such articles shall, in addition to the duty otherwise established, be subject to a special duty of customs equal to the difference between such fair market value and such selling price."[10]

10. Thus, under section 6 of the Customs Tariff, a "special duty" was imposed on all imports of goods of a class or kind Made-in-Canada, whose export price was less than the fair market value as determined under the relevant provisions of the Customs Act.[11] The duty imposed was the difference between the export price and fair market value, but the maximum special duty was not to exceed 50 percent of the normal customs duty and would in no event be more than 15% ad valorem.[12]

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9 Sir William Fielding, Budget Speech, 4365.

10 *An Act to Amend the Customs Tariff*, 1897, S.C. 1904, c. 11, s. 19

11 Customs Tariff section 12 states that to be granted made in Canada status goods must be produced in substantial quantities. Substantial quantities has been defined by Order in Council as more than 10 per cent of normal Canadian consumption. The 10 per cent rule was introduced by Order in Council P.C. 1618 of July 2, 1936. Rodney Grey advises that Canada undertook this limitation at the request of Japan who found their exports frequently subjected to artificially high valuations and collection of antidumping duty on grounds the goods were of a class or kind Made-in-Canada.

12 Sir William Fielding, Budget Speech, 4366.

11. In addition to the exclusion for goods of a class or kind Not-Made-in-Canada, there were exceptions for duty-free products (which could not attract antidumping duties because there was no normal customs duty). In these cases there was no duty to halve to set the upper limit. Jacob Viner also reports that there was a permissable margin of underselling of 5%, which he urged be allowed by other users of AD systems.[13]

12. This system remained in force with few changes for over 60 years.[14] Special duties were generally imposed only after an investigation was initiated as the result of a complaint, or investigations arose out of inquiries necessary to process refund claims.[15] Canny and savvy exporters learned that they could avoid or evade imposition of antidumping duties by declaring a fair market value equal to or lower than the selling price.

13. There was no requirement that material injury be established as a precondition for imposing special duties.[16] Canadian officials at the time argued that the system, despite the absence of an injury requirement, was not nearly as valuable to Canadian industry as Canada's trading partners claimed because of the administrative difficulties of positively proving the presence of a minimum level of Canadian production of the same class or kind of goods.[17]

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[13] Jacob Viner, *Dumping: A Problem in International Trade*, 198, citing Canada, Department of Customs: Customs Memorandum No. 1293B, August 10, 1904.

[14] Important changes were the elimination of the 5% *de minimis* rule and raising the maximum special duty to 50% of the fair market value which was the rule until 1969, when the Antidumping Act was introduced.

[15] Imports into the textile sector were monitored very closely by the Customs authorities and the Canadian Textile Institute. There was particularly close scrutiny of imports other than prime quality merchandise and end-of-season close-outs.

[16] Until 1969 when an injury requirement was introduced, Canada's trading partners claimed that the Canadian system was inconsistent with Article VI of GATT. For some time, Canada appears to have justified the absence of an injury requirement under the cover of the Protocol of Provisional Application to the GATT - the so-called "grandfather clause". Canada also argued in GATT that the pre-Kennedy Round system in Canada was, in effect, based on threat of injury because it was limited in its application to goods of a class or kind Made-in-Canada.

[17] In this connection, see Rodney de C. Grey, *The Development of the Canadian Antidumping System* (Montreal: Private Planning Association, 1973), 19-20, where some practical difficulties encountered by Canadian producers in obtaining AD relief are described. Grey explained that before antidumping duties could be assessed, it had to be first established that the imported goods were of a class or kind Made-in- Canada. This in turn required that the quantity of such goods produced in Canada was equal to or greater than 10 percent of Canadian consumption (Order in Council, P.C. 1618, July 2, 1936). There were apparently many complaints from Canadian producers about the practical difficulties involved in obtaining these rulings. However, when I worked on antidumping at the Department of National Revenue, Customs and Excise (1965-67), there was an extensive index of Made-in-Canada/Not Made-in-Canada rulings available for quick research. This was not a real impediment for most Canadian industries or industrial

14. The negotiation of the original AD Code during the Kennedy Round was the vehicle for bringing Canada's antidumping legislation into conformity with Article VI of GATT. Canada's trading partners argued that Canada could not expect to benefit from trade liberalization aspects of the Kennedy Round unless Canada also brought its antidumping system fully into conformity with the GATT.

15. While Canadian negotiators tried in the Tokyo Round Negotiations to discount the inconsistencies of its previous system with the GATT, in fact the new system:

- was more difficult to initiate;
- provided a more reasonable calculation of dumping; and
- subjected demands for protection to detailed examination of injury by an independent Tribunal.

16. There were other changes however, which benefitted Canadian producers. The *Antidumping Act* extended protection to infant industries by eliminating the Not-Made-in-Canada exclusion and introduced the concept of material retardation. It also introduced the scope for the retroactive application of duties to combat sporadic dumping.[18] It:

- removed the limit of 50% (of the value for duty) on antidumping duties;[19]

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products.

[18] Under the Customs Act and Customs Tariff, duties could technically be imposed retroactively to the date of initiation of the investigation. This provision was seldom, if ever, used unless there was an element of fraud. The Department of National Revenue usually ruled only for the future.

Canada proposed retroactive application primarily to address concerns of the textile industry about the loss of protection of arbitrary valuation methods and automatic imposition of antidumping duties on obsolete, end-of-season and other than prime quality merchandise. Before Canada implemented the Tokyo Round Customs Valuation Code, the fair market value for non-prime materials could not be more than 20% off the prime quality price. For certain textile products, the allowances were even less, apparently in order to combat a novel marketing technique known as "greige seconds finished firsts", which prompted then Canadian Textile Institute President, Mac Berry to describe the U.S. textile industry as the world's worst weavers and best finishers of textiles. For details of previous practice, see Revenue Canada D Memoranda D46-14, D46-15 and D46-16, in effect just prior to the entry into force of the SIMA. See also TN.64/NTB/W/9, 6 April 1966, a Kennedy Round negotiating document submitted by Canada which discussed the problems of sporadic dumping.

[19] A dumping margin of 50% or 50% underselling would mean an advance of 100% over the previous export selling price; e.g., if export price was $50 and fair market value or value for duty was $100, then the AD duty of $50 would be equal to the previous export price. We have seen higher dumping margins and duties under the AD Act and the SIMA.

- enabled the complaining industry to know if antidumping duties were imposed and the level of dumping; and

- introduced greater transparency into the Canadian system.[20]

**White Paper on Antidumping**

17. The change from the non-transparent pre-AD Act system to a transparent rules/injury-based system was a major leap of faith - and was a shock for some Canadian manufacturers.[21] Because of this major change in policy and the significant reductions in tariffs agreed to in the Kennedy Round, the Government of the day decided to consult Canadian industry, importers and the general public about implementation of the Code.

18. In 1968, the Government of Canada issued a White Paper on Antidumping, which provided the focus for submissions to and public hearings before the House of Commons Standing Committee on Finance, Trade and Economic Affairs. The government of the day was quite concerned that those who had been protected by the somewhat automatic antidumping system would not feel too exposed to the cold winds of foreign competition.

19. Then Finance Minister Edgar J. Benson, in his introduction to the 1968 White Paper, noted that Canada's objectives were to protect Canadian exports against the unreasonable use of antidumping duties by other countries, and to leave the Canadian Government free to apply antidumping duties quickly and effectively when dumping caused or threatened injury to Canadian industry.[22]

20. Assistant Deputy Minister of Finance, Rodney Grey, who was responsible for steering the legislation through Parliament, informed the Commons Committee:

> "it has been our view that it would not be expedient for Canada to be, shall we say more liberal or more generous than are our trading partners in their practice under the Code"[23]

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[20] Prior to introduction of the Antidumping Act it was difficult for a Canadian producer to know whether or not antidumping duties were being applied. Customs officers (Dominion Customs Appraisers) would, at the conclusion of an investigation, advise complainants that the Department had issued instructions to the exporter and to port officers to ensure that merchandise would be valued in accordance with the relevant provision of the Customs Act. It simply was not possible to reveal information about the private affairs of another taxpayer (the importer).

[21] Transparency was to work both ways. While Canadian manufacturers would be aware when antidumping measures had been imposed, Canadian complainants would be required to file complaints in writing and to be named as complainants in notices of investigations published in the *Canada Gazette*.

[22] Government of Canada, *White Paper on Antidumping*, (September 1968), 5.

[23] CANADA, House of Commons Standing Committee on Finance Trade and Economic

21. The Honourable Allistair Gillespie, P.C. M.P., noted, with great foresight, at the same hearing:

> "There was a concern -- that this might open up the opportunity for protectionism, of a kind that we have not seen in international trading for some time.[24]

22. Mr. Grey responded that:

> "I think the negotiators were all aware that a decision by one country would in fact, become almost a precedent in the jurisprudence of the equivalent Tribunal in another country and this would be a natural brake on overly restrictive interpretations".[25]

23. Canadian officials could not, at that time, foresee that the GATT dispute settlement mechanism would in a number of areas become less useful than in the first half of GATT's history. The findings of dispute settlement panels under the GATT Codes have been largely ignored in AD and CVD disputes.[26]

24. There have been concerns expressed from the outset about possible differences in administration from country to country. Canadian legislators in 1968 envisaged that there could be inconsistencies in the development of injury criteria, depending on economic conditions in effect at the time of an inquiry. Mr. Max Saltzman, M.P. (Kitchener) raised the following concerns:

> "... the definition of material damage is going to depend to a great extent on the question of the economic conditions in the country at any given time. If a certain industry is booming and the people are dumping it is going to be very difficult to prove any damage; on the other hand, under circumstances where a particular industry is not doing well, it is going to be a lot easier to prove damage."[27]

25. These concerns have a degree of validity. The Antidumping Tribunal and its successors have treated general economic conditions in different ways even from panel to panel. However, Grey argued that the "thin skull theory meant that one must accept their victims as they find them".[28] Indeed, it was easier to find material injury to an industry in a weakened condition.

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Affairs, Minutes and Proceedings and Evidence No. 4, (October 31, 1968), 63.

[24] *Ibid*., 72.

[25] *Ibid.* Unfortunately, some users countries paid attention to the Code and others adopted the more restrictive practices of others.

[26] There were (and continue to be) differences in how the Codes and WTO ADA has been taken into national legislations.

[27] House of Commons Standing Committee, 75.

[28] This is the "thin skull" argument. U.S. AD Code negotiators John Greenwald and Robert Cassidy made similar arguments after passage of the T.A.A. of 1979.

26. Canada's objectives in antidumping policy have traditionally reflected the export dependence of the Canadian economy including the manufacturing sector. In 1991, for example, Canadian manufacturing industries exported 40.9 per cent of shipments, and 79.3 per cent of these exports went to the USA. In dollar terms, total manufacturing shipments were $277.7 billion. Total exports were $113 billion, and exports to the USA were $89.7 billion.

27. That Canada might be more liberal or more generous than other signatories concerned several Committee members. Several of them expressed concerns about whether the USA would properly implement its obligations under the Kennedy Round Code.[29] There was a provision introduced in the U.S. implementing legislation that envisaged that the Code would restrict the discretion of the U.S. Tariff Commission (now the U.S. International Trade Commission or "Commission") in performing its duties under the Antidumping Act of 1921.[30] It was clear that U.S. law would take precedence over the Code.

28. Rodney Grey told the Committee that Canada expected the USA to introduce a meaningful injury test.

> "There might well be cases of dumping of Canadian exports but there would be no possibility of the United States Tariff Commission finding that they injured American producers. The attention that is afforded Canadian exporters who may be dumping in the United States market is such that it is unlikely that Canadian production and exports would be so substantial as to have an impact on the United States market; although it is the case that what might be a very small portion of American production, dumped on a market which may be one-tenth or one-twentieth the size, might have a very substantial effect indeed on Canadian production."[31]

29. Mr. Grey was assuming that the U.S. Tariff Commission (now the USITC) and the Canadian Tribunal would have "precisely the same standard". The other factor that was not taken into account was development of the "cumulative" approach to assessment of injury. Cumulation has become an important feature of both Canadian and U.S. practice. WTO ADA codifies and does not significantly limit the practice.[32] Indeed, the negligibility standard in terms of import volumes has become less generous.

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29 Canada, House of Commons, First Session, 28th Parliament, Standing Committee on Finance, Trade and Economic Affairs. Minutes of Proceedings and Evidence, Vol. 3 (Ottawa: Queen's Printer, 1968), 30-31, 38, 39.

30 82 Stat 1374, Sec 210. This 1968 law stipulated that the AD Code would apply in the United States only if it did not conflict with existing U.S. law and policy regarding injury. See CBO Report, 25.

31 Grey, Testimony to the Commons, 50.

32 Article 3.3.

30. By the time Canada had engaged in the Tokyo Round negotiations, it became abundantly clear that the USA could and would use its antidumping law to find injury at a very low-threshold level. The U.S. failure to adopt a meaningful injury test under the Kennedy Round AD Code led its trading partners to insist on a more meaningful implementation mechanism for future trade agreements. The introduction of the "Fast Track" approval mechanism in the Trade Act of 1974 was the answer. Before Fast Track, Congress could and did introduce amendments that could undermine the agreements concluded by U.S. negotiators.

31. It is clear from Grey's description of the Kennedy Round negotiating process that Canada's objectives were more focused on maintaining an effective mechanism to address injurious imports than some other participants. Grey notes with respect to Canadian differences with the U.K.:

> "The Canadians had to insist on the right of the authorities to initiate an investigation themselves."[33]

32. This right of self-initiation while rarely used has in recent years been used more frequently by Canada than the USA. However, Canada has never employed it in an investigation involving imports from the USA. The USA has self-initiated only once against Canada in a CVD case involving *softwood lumber*. The magnitude of Canadian trade affected by that self-initiation was several billions of dollars.[34] Although the value of the trade of this single instance of self-initiation was large, it should be recognized that there were other trade policy issues in play that appear to have influenced the self-initiation decision.[35] It should not be seen as establishing a trend.

33. On the question of causation and, in particular, principal cause, Grey noted:

> "The Code is, of course, a set of negotiated words - negotiated between those (e.g., Britain) who wanted a Code that would limit the application of dumping duties to those cases in which the major factor injuring an industry was dumping and those (e.g., Canada) who wanted to be allowed to levy antidumping duties when substantial injury was caused by dumping, whatever might be the other factors at work and whether or not other factors were adversely affecting the industry."

34. In his view, the principal cause needlessly limited the usefulness of the Code. The Canadian standard from the start was that the injury caused by dumping must in and of itself cause injury that is material.

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[33] Grey, Testimony to the Commons, 51.

[34] Self-initiation in the third softwood lumber case was referred to a GATT Panel but was not condemned.

[35] An important issue was the objection of the U.S. producers to Canada's decision to terminate the Memorandum of Understanding that had resolved the dispute.

**Proposals on Import Policy**

35. The Antidumping Code negotiated during the Tokyo Round brought about a number of changes that were adopted into Canadian legislation by the passage of the *Special Import Measures Act*.[36] The proposed changes were considered in detail by the Sub-Committee on Import Policy of the House of Commons Standing Committee on Finance, Trade and Economic Affairs.

36. Among the key changes were:

- improved transparency and disclosure provisions;
- introduction of a "public interest" provision;
- abandonment of the "principal cause" injury standard;[37]
- introduction of procedures for suspending an investigation upon receiving undertakings;
- strict time limits for the processing of complaints received by Revenue Canada;
- introduction of a limited form of preliminary injury inquiry;
- improved availability to "regional industries" of relief in the absence of injury to the major proportion of domestic production (based on the Article 4 of the Antidumping Code as agreed to in the Tokyo Round)[38]

37. While not discussed in the *Proposals for Import Policy*, nor in the May, 1982 Report of the Subcommittee, the concept of a sunset clause was introduced in SIMA, even though the Tokyo Round AD Code did not specifically require it.[39]

**CUSTA and NAFTA Revisions**

38. The Canada-United States Free Trade Agreement (CUSTA) and NAFTA maintain the AD systems of both Canada and the USA in place without change.[40] However, Canada and the USA, through the CUSTA, introduced new binational dispute settlement and judicial review mechanisms. CUSTA, with the exception of the introduction of judicial review for final determinations of dumping and subsidizing possibly Article 8.1.1. (which may inadvertently have introduced a more

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36 RS, 1985 c. 81 as amended.

37 Grey and others had argued that the principal clause provision was redundant. The Canadian position has been that the dumping must cause injury, through the effects of the dumping, that is material in degree. This does not mean that there can be no other important causes of material injury - it simply means that the injury directly attributable to dumping must be material. The WTO ADA comes closer to the Canadian standard.

38 The text of the Tokyo Round Agreements was less restrictive than that of the Kennedy Round Agreements in that it did not require geographic isolation.

39 Article 9 of the Code required that duties remain in place only for so long as is necessary to combat the injury and that authorities review the need for continued protection.

40 CUSTA Article 1901.

rigorous system with respect to imports from the United States), did not change the administration of Canadian legislation significantly.[41] The Panel process, however, is providing Revenue Canada much needed guidance on their procedures.

39. NAFTA extended CUSTA Chapter 19 Dispute Settlement benefits to Mexico. There were a number of consequential amendments to SIMA.

40. U.S. and Canadian exporters who have been involved as respondents in Mexican AD investigations have recognized the value of imposing NAFTA Chapter 19 disciplines on Mexico. It is also interesting that the 1994 Trade Barrier Estimate issued by the U.S. Trade Representative (USTR) lists Canada's use of AD law and practice. USTR reported:

> "Canadian industries have used Canada's Special Import Measures Act (SIMA) to restrict access to the Canadian market by U.S. producers. The last two years have seen a marked increase in the number of anti-dumping cases filed against U.S. companies, affecting a wide range of goods shipped to Canada: *beer*, *file folders*, *christmas trees*, *carpets*, *lettuce*, *cauliflower*, *gypsum drywall*, *toothpicks*, *tomato paste* and *steel*."[42]

41. Since then there have been investigations on a number of products from the USA including *apples, jars, caps and lids* and *refined sugar*.

**Canadian Implementation of the WTO ADA**

42. Specific amendments to the SIMA included, *inter alia*:

- new definitions covering such concepts as domestic industry, subsidy, specific subsidies, financial contribution, insignificant amounts of subsidy or margins of dumping, negligible volumes of dumped or subsidized goods, injury and threat thereof, domestic industry, etc.;

- new rules governing domestic industry standing for purposes of initiating an investigation;

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[41] In brief, SIMA s. 8.1.1 provides that, if there was to be a reversal of a non-injury decision pursuant to judicial review, the importer could be liable to the imposition of antidumping duties retroactive to the original preliminary determination. While Revenue Canada argues that goods of other countries in similar circumstances would be treated in the same manner, SIMA s. 8 does not so specify - and certainly not in terms as specific as apply to goods of the USA. Revenue Canada does not agree with the interpretation with respect to other countries and should this situation arise (the no injury finding in *fabric-covered, padded wooden clothes hangers* (CIT-4-88) was remanded, but not overturned on review). Revenue Canada would likely demand payment of duties and litigate the eventual appeal.

[42] USTR 1994 National Trade Estimate Report on Foreign Trade Barriers, (March 31, 1994), 43.

- revised duty liability provisions resulting from the acceptance of undertakings after a preliminary determination and the completion of an investigation and inquiry at the request of an exporter, government of an exporting country, or on the Deputy Minister's own initiative;

- a new mechanism providing for expedited reviews of normal values, export prices or amounts of subsidy;

- new rules for the calculation of the margin of dumping and amount of subsidy;

- new rules governing the treatment of sales below cost;

- new rules governing the termination of investigations based on insignificant margins of dumping or amounts of subsidy or negligible volumes of dumped or subsidized goods;

- provisions for the review of determinations, orders or findings at the discretion of the Minister of Finance based on WTO Panel decisions.

**Evolution of the U.S. Antidumping System**

43. In order to address foreign price competition to its textile industry, the USA introduced a minimum tariff system in the *Tariff Act of 1816*. All cotton cloths costing less than 25 cents per yard were considered to have a cost of 25 cents per yard and were charged duty accordingly. That is, such imports were charged the tariff of 25 per cent on 25 cents, or a minimum of 6¼ cents a yard, whatever their real cost.[43]

44. Although this system of minimum values for duty was not an antidumping system, it was a means of combatting low prices (whether or not these were dumping prices). In effect, it was a dumping duty of 25% on the underselling of a target price.

45. The duty paid price of goods valued at $0.20 would, without a minimum value system, be $0.25. With the minimum value law, it would be $0.2625, or an effective increase in the tariff of 5 percentage points. In the textile industry even today, 5% is a very significant amount in relation to net profitability.

46. Taussig notes how effective the minimum valuation system was:

> "The price of coarse cottons fell to 19 cents in 1819, 13 cents in 1826 and 8½ cents in 1829. The minimum duty became proportionately heavier as the price decreased and, in a few years after its enactment, had become prohibitive of the importation of the coarser kinds of cotton cloths."[44]

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[43] F.W. Taussig, *The Tariff History of the United States*, Eighth Edition (1931), (Augustus M. Kelley Publishers, New York, 1967), 30.

[44] *Ibid.*

47. The minimum valuation was raised to 30 cents in 1824 and in 1828 to 35 cents.[45]

48. While there was no determination of dumping (or injury) under the minimum valuation system, the intent was similar: to reduce the competitive price difference between domestic goods and imports. There are parallel features in the E.U.'s variable levy system, which has applied to imports of agricultural products.[46] Both limit the ability of foreigners to reduce prices to gain market share.

49. In the 1890s and early 1900s, the USA imposed retaliatory duties on imports of pulp and paper from Canada, specifically from Ontario (which had an export ban on logs) and Quebec (which imposed an export duty on logs). Taussig attributes these Canadian actions to the *National Policy*, of which he notes:

> "But our legislators had reckoned wrong. Canada had for two decades after the termination of the old reciprocity treaty tried to re-establish friendly commercial relations with the United States. Her offers had been steadily and almost ostentatiously repulsed. The "National Policy" of protection, adopted by Canada at the outset largely by way of retaliation, had gradually been made stronger and more sweeping. By 1909 it had such a firm hold that there was no thought of submitting to what seemed a bullying attitude on the part of the United States".[47]

**Tariff Act of 1909**

50. In 1909, the Congress proposed a change to U.S. minimum and maximum tariff rates. The stated tariff rates were declared to constitute the minimum tariff of the United States. On imports from countries that "unduly discriminated" against interests of the USA, an additional tariff of 25% *ad valorem* was imposed. The term "unduly discriminated" included discrimination in tariffs, trade or other regulations, charges on exports or in any other manner, or by export bounty or export duty (perhaps directed at Quebec paper products?) or export prohibitions (perhaps aimed at Ontario?).[48]

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45 *Ibid*., 35.

46 The E.U. Common Agricultural Policy must be amended as a result of the Uruguay Round Agreement on Agriculture, but the system still operates as a price uplift system above minimal access.

47 Taussig, *Tariff History*, 381-382.

48 Canadian forest products attracted considerable attention during Congressional debate on the Tariff Act of 1909.

> "Free lumber would lead to slightly larger importation from Canada along the eastern frontier, but probably none of any moment in the Northwest. It would check a bit, even if only a bit, the wastage of our own forests, and in so far was clearly a sound policy. Not a few Southern representatives voted for the retention of the duty on lumber, and their votes turned the scale in its favour. Yet, both because of geographical limitation of competition and because of the different quality of southern lumber, the

The declarations of whether or not there was "undue discrimination" was left to the President, who at the time the provision was to enter into force, declared that there was no "undue discrimination against the United States by any country whatever".[49]

51. This was the great-grandfather of Section 301 of the *Trade Act of 1974.* There is a similar infrequently used provision in the Canadian Tariff (now CT sec. 59(2)), and it was probably a similar provision in 1903 that resulted in the imposition of the special surtax on Germany at that time.[50]

52. It is Finger's impression that the U.S. history of antidumping laws is different than Canada's.[51] In Finger's view, policing the evils of monopoly powers in foreign lands was rhetoric used in Canada to justify a political compromise required of the government of the day in 1904. However, in the USA, at the early stages, antidumping regulation was very much an extension of antitrust laws. Thus, as Finger notes, "there was a better match between the rhetoric and the mechanics of the matter..."[52] Other observers, including Taussig, had a different view.

53. While Minister Fielding's concerns appear from the Budget Speech to be directed at cartels (a competition policy or anti-trust target), these concerns were combined with a desire to provide selective protection from a perceived evil rather than a general increase in tariff protection, which Finger also recognizes.[53]

54. Finger notes, "these early laws did not provide what the motivating politics demanded - restrictions of imports - and there was continuing pressure for change". This was clearly the view of Congress who found the Antidumping Act of 1916 more or less ineffective.[54]

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> duty was of no real consequence to their constituents. The attitude both of constituents and representatives illustrated the state of veritable funk concerning lower duties (not to mention free trade) which had been induced by the constant shouting about safeguarding American industry against pauper labour". (Taussig, 383.)

49 *Ibid*., 403-04.

50 Sir William Fielding, Budget Speech, 4350.

51 This impression is shared by the authors of the CBO Report "How the GATT Affects U.S. Antidumping and Countervailing Duty Policy" (see chap 1, note 5).

Finger, *Origins and Evolutions of Dumping*, 17-22. In tracing the history of U.S. antidumping laws prior to and up to 1921, I have also relied in part on Finger's research as reported in his aforementioned article, to supplement my own. His work and interest in antidumping has encouraged much needed public and academic debate on the subject.

52 *Ibid.*, 18.

53 *Ibid.*, 14.

54 U.S., House of Representatives Report No. 479 (December 8, 1919). Congress sought legislation proposed in HR 1091.8, which was the model for the Antidumping Law of

55. *The Sherman Antitrust Act of 1890* prohibited, under severe penalties, every contract or combination in restraint of interstate or foreign commerce in every monopolization or attempt to monopolize such commerce. However, Finger notes that the application of this statute to imports was severely limited by a Supreme Court decision that the USA could not apply the Sherman Act to any sales contract that had been made in the exporting country rather than in the USA.[55]

56. The U.S. Congress, by way of Section 73 of the *Wilson Tariff Act of 1894*, attempted to extend the scope of the *Sherman Antitrust Act* to imports by making unlawful every conspiracy or combination that was: (a) engaged in importing, and (b) intended to restrain trade or to increase the price in the USA of an imported article. Violations were criminal offenses subject to fines, imprisonment or both.[56] Finger notes that until the time of the writing of Professor Viner's book (1923), this law had been invoked only once, against an association of U.S. bankers and importers, and the Brazilian state of Sao Paulo, to limit Brazilian exports, so as to rig the price of coffee on the U.S. market.[57] This law was passed before the Supreme Court had ruled out extra-territorial application of the Sherman Act, and that ruling appears to apply to the Wilson Tariff Act too.[58]

57. The *Tariff Act of 1909* introduced a general antidumping provision that was maintained on substantially the same basis in the *Tariff Act of 1913*. This law authorized the Secretary of the Treasury to impose additional duties equal to the amount of any grant or bounty on exportation given by any foreign country.[59] While Taussig refers to this as an *antidumping* provision, it is clearly of the nature of anti-subsidy legislation. Even 80 years ago, there was a blurring of these "unfair" trading practices.

58. The *Antidumping Act of 1916* resulted from President Woodrow Wilson's recommendation to Congress to make it illegal to import goods at a price substantially below the "actual market value" in the producing country or in the countries to which they were commonly exported, provided there was an intent to injure, destroy, or prevent the establishment of an industry in the USA or to restrain competition. This was an attempt to extend the anti-trust laws to people and firms involved with importing.[60] President Wilson's recommendation was made during World War I when there was strong anti-German sentiments and the widespread conviction that German enterprises were particularly vicious perpetrators of predatory dumping.

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1921 as amended by the Tariff Act of 1930 that would "prevent the stifling of domestic industries by the dumping of foreign merchandise at less than its fair value in the country of production".

55 Finger, *Origins and Evolutions of Dumping*, 18. Also, the CBO Report, 19 notes that rather than amend the Sherman Act to extend its application, Congress chose to pass separate laws for the pricing of imports. See also Garten, *Notes for Remarks*, 5.

56 CBO Report, 19.

57 Finger, *Origins and Evolutions of Dumping*, 18.

58 See CBO Report, 19.

59 Taussig, *Tariff History*, 443.

60 CBO Report, 20.

59. Finger argues that the 1916 Act introduced by the Wilson administration was like the Canadian government's proposal, an attempt to avoid opening up the entire tariff for revision, and instead aimed specifically at foreign dumping.[61] However, other commentators disagree. The 1916 Act deals only with predatory dumping practices. In his memorandum on dumping to the League of Nations, Viner explained that there were five kinds of practices classified as dumping:

- elimination of periodic overstocks in a way that does not "spoil the market" at home;

- pricing to develop or maintain markets for new or existing markets; this is a temporary practice that Viner judged "would not continue indefinitely";

- increasing sales volume and reducing average per unit costs for the entire output where there are net reverse gains from dumping because low export prices are offset by cost reductions;

- dumping from shielded markets where home market prices would not be competitive internationally;

- dumping, even involving a temporary loss designed to drive a competitor out of a foreign market (predatory dumping); this can also occur as a (defensive) response to predatory dumping by another producer in a foreign market.[62]

60. The 1916 law is still in place and provides for treble damages for parties injured by the practices targeted in the law. However, despite the attractiveness of treble damages, only one serious private suit was brought under this law in 1970.[63] The suit was dismissed on summary judgment when the petitioner (Zenith) did not provide facts to support claims of predatory dumping.

61. The law enacted by the Congress of the United States under the heading of "Unfair Competition" of the Act of September 8, 1916, is not the basis of current antidumping regimes in North America. It never was an effective mechanism for addressing injurious dumping. It was for all practical purposes still-born.

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[61] The statutory provisions were enacted as Sections 800 to 801 of the *Revenue Act of 1916*, 15 U.S.C. 72. For a very useful discussion of the 1916 Act by a knowledgeable anti-trust and trade practitioner, see Kermit Almstedt, *"International Price Discrimination and the 1916 Antidumping Act: Are Amendments in Order*?" Law and Policy in International Business (Summer 1981): 747-81.

[62] Jacob Viner, *Memorandum on Dumping*, (Geneva, 1926), 6-7. Viner notes of predatory dumping

> "Such dumping is unlikely to continue for a long period since it will end either when its objective is attained or when its attainability, except perhaps at ruinous cost, becomes evident".

[63] *Zenith Radio Corporation* v. *Matsushita Electrical Industry Co.*

62. Several factors contributed to the difficulty in using the 1916 Act. These included the difficulty involved in proving predation and the tasking of the Department of Justice, who had no particular trade expertise with administrative responsibility. This put too much investigative burden on petitioners and limited prospects of success.[64] Canadian officials long ago recognized that the Combines Investigation Act, calling for criminal penalties and a "beyond reasonable doubt" standard for obtaining conviction, was ineffective.[65] Further, the defences available under competition law would greatly reduce the scope for finding injury. It is these features of competition law which makes it appear a desirable substitute for AD law.

63. These realities underlie the current pressure to replace AD laws and rules with a competition-based system. But users of AD laws and politicians recognize that this change would result in significant market opening and possibly a rapid adjustment for import competing industries, particularly labour intensive industries. At the best of times, this is not an attractive political option. The massive global rationalization and restructuring of productive facilities, catalyzed by information and other technologies have created unemployment problems. And budgetary problems have limited Governments' ability to assist the unemployed. Governments must promise more and better jobs. Vigorous use of antidumping laws is a very "quick-fix" way to support basic industries and slow increases in unemployment.

64. Countries heavily dependent on exports with relatively no home markets may be prepared to make the switch to competition based systems because they anticipate more secure access to foreign markets. But for other countries, it is too easy to blame problems on foreign competition. This approach may be wrong but politicians must treat perceptions as reality, and a serious reality for politicians who must focus on the short term is that foreigners do not vote.

65. *The U.S. Tariff Commission Study of 1919* came about as a self-initiated investigation in 1916 by the U.S. Tariff Commission to determine the extent of foreign competition in the U.S. market and of Canada's experience with this antidumping law.[66] The key question it asked respondents in its survey was what "personal knowledge [did they have] of unfair competition through the selling in the United States of articles of foreign origin at less than the fair market value when sold for home consumption in the country of origin". The Commission contacted 562 U.S. business enterprises directly and asked 13 trade associations (representing producers) to circulate questionnaires to their

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64 See CBO Report and Viner, *Memorandum on Dumping*.

65 It has since been superseded by a Competition Act (RSC 1970 c.C-23 am. 1986 c.26) and a Competition Tribunal. See Competition Tribunal Act, SC, 1986 c.26.

66 CBO Report, 19. The U.S. Tariff Commission noted that the 1916 U.S. Act

> "apparently fails where the Canadian laws succeed, in not contemplating, in reasonable cases the prohibition of sporadic dumping since its penalties apply only to persons who `commonly and systematically import' foreign articles, and providing that such importation must be made with intent to injury, destroy or prevent the establishment of an industry in this country or to monopolize the trade and commerce in imported articles. Evidently, for the most part, the language of the act makes difficult, if not impossible, the conviction of offenders and, for that reason, the enforcement of its purpose".

membership. Finger notes, "thus every enterprise in the United States against which imports provided some degree of competition was informed of the investigation and had the opportunity to respond."[67]

66. The Commission found that approximately one-half (146) of the 281 respondents had encountered some form of foreign competition, but the others (135) had experienced no unfair foreign competition or dumping. Of the instances where foreign competition was encountered, 23 respondents complained of dumping (as the questionnaire had framed it: lower export price than domestic price), but an overwhelming proportion (97 of the total of 146) cited "severe competition". Of the instances where "severe competition" was cited, Finger notes that there were complaints against foreign competitors who had cost advantages.[68] Examining the examples cited by Finger, it is reasonable to conclude that some of these examples may have involved or export pricing supported by home market profits. Indeed, in my experience when an exporter operates in a protected home market he will price up to the level of his tariff protection. Faced with the need to sell at world prices in export markets they will sell at those prices. These export prices are dumped prices but most exporters, in our experience do not even think of this as dumping.

67. Finger views the results of the survey as not very supportive of the implementation of antidumping regulations:

> "We see then that advocates of antidumping regulation presented no unique reasons for this unique form of import protection. As in Canada in 1904, the voice that called for antidumping action was the voice of ordinary protection."[69]

68. It seems clear that there was a desire in Congress to provide a mechanism that could be employed selectively to deal with dumping. This was the underlying motive that drove the introduction of the Canadian law. Pressures for a Canadian-style antidumping law continued and resulted in the passage of the *Antidumping Act of 1921*.[70] The present U.S. antidumping law can be traced back to that statute.

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67 Finger, *Origins and Evolutions of Dumping*, 19.

68 Examples cited by Finger include the patent leather industry, which claimed that such leather exported from Germany

> "was sold at a cost that could not be produced in United States. Similarly, in respect of Japanese garment leather, the claim was made that sale of such leather was made at prices that merely covered the cost of green hide, to say nothing of the cost of manufacturing".

*Ibid.*

69 *Ibid.*, 21.

70 The simplest comparison of the 1921 law with the 1916 law indicates that these two laws differ in two ways: (1) the injury criterion of the 1921 law is not prefaced by the words "intent to" and (2) enforcement is an administrative matter rather than a purely legal matter. According to Finger, it was more the latter aspect than the former that may have made the use of the 1916 statute more difficult:

69. The 1921 legislation authorized the Secretary of the Treasury (who was responsible for the Customs service) to impose antidumping duties

> "when he determined that a U.S. industry was being or likely to be injured or prevented from being established by imports of a product at a price below its fair value in the exporting country or in other export markets."[71]

70. As is discussed in further detail below, responsibility for dumping investigations was assigned to the Department of Commerce in 1979 (because industry considered the Treasury Department was too soft and too internationalist in its perspective). Determination of injury was delegated to the U.S. Tariff Commission (now the USITC).

71. The current U.S. antidumping law is Subtitle B of Title VII (§ 731-739) of the *Tariff Act of 1930,* as amended.[72] The U.S. law requires that antidumping duties be imposed when the Department of Commerce determines that a class or kind of foreign merchandise is being or is likely to be sold in the USA at less than fair value, and the U.S. International Trade Commission (USITC) determines that an industry in the USA is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.[73]

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> "We are left then with the conclusion that the limited scope of the 1916 law stemmed from its being a *legal* remedy, a part of criminal law and therefore subject to the strict rules of meaning and proof that apply to the law. The courts took antitrust law to be the relevant legal context for giving meaning to the terms in the law, and in this context the 1916 act was interpreted to demand the `injury to competition' standard.
>
> Dissatisfaction with the 1916 Act was political, not legal dissatisfaction; and in politics, this dissatisfaction was relative to what a Canadian-style administrative remedy would provide. Rule of law was what was blocking things, not any particular word in the law. Enlarging the scope of action against imports would require a shift from a legal to an administrative approach - or, if one wants to use the pejorative synonym, a bureaucratic approach." (Finger, Ori*gins and Evolutions of Dumping*, 22-3)

71 *Ibid*., 20.

72 19 U.S.C.A. § 1673; 93 Stat. 162, 98 Stat. 3024, 100 Stat. 2921, 102 Stat. 3806.

73 This wording seems to be very close to the object and purpose of Canada's *Special Import Measures Act* (SIMA). But there have in the past been significant differences in the precise implementation of the similarly stated objectives. Differences between Canadian and U.S. administration and practice have been narrowed by the WTO ADA.

**The Kennedy Round**

72. The first AD Code was developed as a result of extensive negotiations originally promoted by the United Kingdom.[74] The objectives included:

- transparency;
- more realistic calculation of dumping margins;
- protection against one-shot or sporadic dumping (eliminating repeated first free bites); and
- disciplines on U.S. use of the regional injury test.[75]

73. The main cause for concern was that the U.S. did not require an injury test as envisaged by the AD Code. To a very significant degree, the first Code did not result in substantial changes in U.S. law and practice.

**The Trade Act of 1974**

74. There were important changes in U.S. law as a result of the introduction of the concept of selling below cost as a form of dumping. Both Canada and the United States defended this shift by claiming that sales below cost were not in the ordinary course of trade.[76]

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[74] Based on the author's experience at the time with Revenue Canada and the Department of Finance and discussions with Canadian AD Code negotiator Rodney Grey.

[75] The USA could find injury on a regional basis but had to impose antidumping duties at all ports of entry.

[76] Pressures for a below-cost standard in Canada were led in the 1970s by petrochemical and chemical fibre producers, who were particularly vulnerable to (and experienced in) disposals for export at prices based on incremental cost plus some contribution to fixed overheads.

Viner in *Dumping: A Problem in International Trade*, 193, points out that in 1921, Canada amended the definition of "fair market value" in the Customs Act to provide that the value for duty shall in no case be less than the actual cost of production of similar goods. (RSC 1906 S. 40 Ch. 48 as amended June 4, 1921)

He explained that goods imported at prices lower than cost of production were subject to antidumping duty even if the same situation and low prices existed in the country of export. Viner opined:

> "The difficulty of determining foreign costs of production may be expected, however, to make this provision inoperative except in extreme cases, although it may conceivably become important because of the greater latitude which it gives to the dumping authorities in deciding whether dumping is being practiced in particular instances".

Viner, *Ibid.*, 198-200.

75. U.S. administration was improved and tightened by the introduction of time limits to encourage more expeditious relief and more structured and predictable procedures.[77]

**Tokyo Round/The Trade Agreements Act of 1979**

76. The *Trade Agreements Act of 1979* implemented changes to U.S. law resulting from negotiation of the 1979 GATT Antidumping Code.

77. The results of the Tokyo Round were generally disappointing and issues such as fixed minimum profits and General Selling and Administrative Expenses (GS&A) in constructing Fair Values for sales at less than cost of production were essentially unresolved.

78. It was thought that the Tokyo Round material injury test represented a substantial watering-down of the injury (and causation) tests negotiated in the Kennedy Round AD Code.[78] As subsequently interpreted by the USA, the material injury test has not become more difficult to meet.[79] Both the USITC (at least some Commissioners) and at times the CITT have found in the affirmative when dumped imports have been a cause of material injury, without quantifying the amount of injury due to the effects of dumping the dumped imports.

79. Thus, in respect of both antidumping and countervailing duties, the Tokyo Round Agreements left export-oriented countries with little more - and possibly less - than what they had previously. The 1979 AD Code did not make the application of unfair trade laws less trade restrictive. It codified, institutionalized and gave credibility to those practices that, prior to the negotiations, were in dispute or considered to be trade inhibiting.

80. Since the end of the Tokyo Round, trade laws have increasingly been used to harass trade. The Tokyo Round codified and structured the use of the antidumping remedy along the lines of U.S. practice. The 1979 AD Code has made it easier for industrialized countries to impose additional

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[77] Canada did not legislate more effective time limits until the passage of the SIMA in 1984.

[78] Some observers argued that removing the principal cause requirement of the Kennedy Round Code diluted the threshold. But the wording of the 1979 Code requires that:

> "It must be demonstrated that the dumped imports are, through the effects of the dumping causing injury within the meaning of the Code."

(Source: 1979 AD Code Article 3.4.)

This means that the dumping of the dumped imports must cause injury that is material in degree.

U.S. Senate Finance Committee Discussions on the U.S. Trade Agreement Act of 1979 defines "material injury" as injury that is not immaterial (or not inconsequential or unimportant) - a rather meaningless threshold. See 19 U.S.C. 1677(7)(A).

[79] It must be recognized that while the low threshold is U.S. law, there have been numerous negative injury findings by the USITC. But numerous commentators, particularly counsel who normally act for respondents, argue that with a more meaningful test of injury, there would be fewer affirmative findings.

duties on allegedly "unfair" imports, thereby impairing full gains expected by reducing regular or statutory duties in the Tokyo Round.

**The Trade and Tariff Act of 1984**

81. Title VI of the 1984 Act introduced the following changes to U.S. AD law:[80]

* Amended the definition of sale for importation to include prospective sales and leasing arrangements equivalent to a sale;[81]

* Provided for an expedited P.D. if petitioners and other interested parties agree to waive disclosure and have the P.D. made on the basis of information collected in the first 50 days of the investigation;

* Toughened the rules about determination of critical circumstances;

* Provided for joining of CVD and AD investigations;

* Introduced monitoring provisions to address persistent dumping;

* Placed the burden of proof on the party seeking revocation of an antidumping order;

* Modified the rules about cumulation to require cumulation in AD/CVD cases;[82]

* Elaborated Commission procedures to be employed in determining threat of injury;

* Provided that the reseller's price should be taken into account in determining purchase price;

* Modified the rules about timing of date of sale for related-party transactions;

* Improved rules on the use of averaging in determining dumping margins;

* Increased assistance to small petitioners.

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80 Public Law 98-573, (October 30, 1984).

81 SIMA and the Antidumping Act have treated irrevocable tenders and offers to sell as sales.

82 Tariff Act § 776 as amended by 19 U.S.C.A. § 1677c, 93 Stat. 186.

**Omnibus Trade and Competitiveness Act of 1988**

82. The *Omnibus Trade and Competitiveness Act of 1988* introduced a number of significant changes to U.S. antidumping law, some of which are discussed below.[83]

83. The 1988 Act introduced new rules for the Prevention of Circumvention of Antidumping and Countervailing Duty Orders. Downstream Product Monitoring focused on imports of components that constituted a significant portion of the costs of production of the downstream product. The components must have been subject to a dumping deposit of at least 15 per cent. It appears that in examining whether exports of components have increased, the Department of Commerce may look at all imports from the subject country. Thus, even if imports from an individual exporter did not increase, but total exports increased, individual exporters might still be affected. The failure of the Congress to define what it meant by a "small" difference between the value of the subject components and the value of the finished product makes it difficult for an exporter to plan, or even to know if it is in compliance with the U.S. law.

84. Finally, the fact that the assembler in the USA is not related to the subject exporter, while helpful, does not guarantee that the provision will not be applied.

85. This provision would also impose AD duties on imports of finished goods assembled in third countries from components that are subject to an existing U.S. AD order. The purpose of the amendment was to make the U.S. CVD/AD system more watertight. Of particular concern is the notation that a change in tariff items will not necessarily exempt a product, or processing from antidumping action. There may also be problems where third country production and products assembled from dumped components could be caught up in the same net.

86. Canada does not have a formal anti-circumvention rule on the USA or E.U. models. A Canadian complainant would need to file a new complaint. There have been situations in Canadian experience where complainants have tried to include imports of kits or parts[84] in an investigation of finished products. The Tribunal has accepted some and rejected others. Nor does Canada support these automatic enforcement provisions. The very existence of such provisions in USA (or E.U.) anti-dumping law may have a chilling effect on trade.[85]

87. Canada is not without its own defences against "country hopping". While it has not been Revenue Canada's practice to self-initiate new investigations on downstream or component products, they have done so with respect to products subject to existing orders.[86]

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83 See Peter Clark and Sheila Landers, *Harassment of Developing Country Trade*, (UNCTAD/MTN/INT/CB, March, 1989).

84 *Cars from Hyundai* (CIT-13-87) and *polyphase electric induction motors over 200 h.p.* (CIT-5-88) and *Bicycles from Taiwan and China* (NQ-92-002).

85 Canada has been the target of one such action, in *brass plates*. Canada would, in the absence of clear WTO ADA rules, challenge the unwarranted extension of antidumping findings.

86 See CITT *carbon steel plate* from Italy, Ukraine, etc. (NQ-93-004) and *photo albums* (NQ-90-003).

88. A Canadian producer who can document a case of circumvention, say by the assembly in Canada of parts, may be able to persuade Revenue Canada to apply duties on the imported components. This was a matter of considerable discussion in *polyphase induction motors*[87] where several importers established assembly/testing operations in Canada to replace their imports of dumped assembled motors. Revenue Canada insisted on some level of manufacturing/processing in Canada, e.g., winding the motors, or they would collect duties on the imported parts and sub-assemblies. The Department visited and audited these assembly operations to ensure that there was an adequate level of production in Canada. Simple assembly has not been deemed adequate.[88] It is not clear that Revenue Canada ever imposed AD duties on parts and components under this practice but they did threaten to.[89]

89. By contrast, with *preformed fibreglass pipe insulation with a vapour barrier from the USA*, Revenue Canada ruled that importers may import the product without a vapour barrier, and apply the vapour barrier in Canada without attracting anti-dumping duties.[90]

90. In determining material injury, the Commission is required to consider the volume of imports, the effect of imports on prices in the USA for the like product, and the impact of such imports on domestic producers of the like product. In specific cases, however, it appeared that some of the Commissioners did not apply all of the factors. In some cases, Commission decisions did not make clear which factors had been applied. Section 1328 of the 1988 Act requires the Commission, in evaluating material injury, to consider all three enumerated statutory factors in every case and to make a detailed explanation of its analysis, including a description of any other factors that may have been considered.

91. The law requires the Commission to consider whether there has been significant "price underselling" of the U.S. product. Under prior law, some Commissioners narrowly interpreted "price undercutting" to mean only predatory pricing to gain market power. "Underselling" is a different concept than "undercutting". Since the 1988 Act, the Commission must consider in evaluating the effects of imports on prices not only predatory pricing but also below-market prices that have an injurious effect.

92. Further, prior law also required the Commission in its material injury analysis to examine "all relevant economic factors which have a bearing on the state of the industry".[91] The 1988 Act added

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87 *Polyphase induction motors from Brazil, Japan, Mexico, Poland, Taiwan and U.K.* (CIT-6-85).

88 Revenue Canada, AD CVD Division Staff discussions with the author.

89 However, in *power tools from Japan* (ADT-12-79), Revenue Canada did impose such duties.

90 CITT, NQ-93-002.

91 These included: actual and potential decline in output, sales, market share, profits, productivity, return on investment, and utilization of capacity; factors affecting domestic prices; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

another statutory factor for the Commission to consider in determining the injurious impact of imports on the affected industry: the "likely negative effects on existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product".[92] The Commission is to evaluate all the relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

93. This provision required that the U.S. International Trade Commission explain its analysis of the "material injury" issue better than it had done.

94. The 1988 Act attempted to tighten the rules about establishing threat of material injury. This Act codified some of the factors the Commission had previously applied at its discretion in assessing the threat of material injury, and added other factors for the Commission to consider.
95. The 1988 Act added three statutory factors to those the Commission must consider in its threat of injury analysis:

- whether dumping in foreign markets, as evidenced by outstanding anti-dumping orders or findings against the same party on the same merchandise in GATT member markets, suggests a threat;

- the likelihood of product-shifting between a raw and processed agricultural product when there is an anti-dumping or countervailing duty order on one but not on the other;[93] and

- the actual and potential negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the like product. [94]

96. The Act also provided that in an investigation involving both raw and processed agricultural products, the Commission is to consider the likelihood of product-shifting, i.e., whether there would be increased imports of one product if an anti-dumping or countervailing duty order is placed on the other.

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92 19 U.S.C.A. 1675 a. (a)(4)(c).

93 It would appear that this was designed to address claims by some U.S. Senators that Canada shifted its exports from live swine to pork when there was an injury finding against live swine from Canada.

Canada's analysis is much more traditional. However, until recently (*refined sugar* NQ-95-002), the Tribunal had been less likely to find only future injury than they had been in the period prior to SIMA coming into force.

94 The legislative history of the "high tech" products clause is not found in the AD Code of the Tokyo Round nor the 1994 WTO ADA. In certain circumstances, it is a factor that could be addressed in the normal consideration of injury.

97. Other provisions were not particularly noteworthy except those that make it easier for a high-tech U.S. company to obtain affirmative injury determinations even if it is profitable.

**The Post-Tokyo Round Injury Test is a Low-Threshold Test**

98. There were fears that the Tokyo Round material injury test would not improve the situation.[95] These fears appear to have been well-founded. In all the major users of AD duties, more than 70 per cent of inquiries result in affirmative injury findings. There is, however, no predictable pattern, and some important cases have had negative injury findings.[96] Thus, little has changed, and the systems emerging from the Tokyo Round Codes have not given exporters much comfort.

99. Practices such as *cumulation*[97] in determining injury have permitted importing countries to impose AD or countervailing duties against smaller exporting countries *before* they have had a chance to export significant volumes or to cause material injury.

**Cumulation**

100. Prior to 1984, the U.S. AD and CVD duty laws neither mandated nor prohibited the Commission from cumulatively assessing the impact of imports on the domestic industry in cases involving more than one country. Individual Commissioners decided whether to cumulate on a case-by-case basis. The 1984 Act stripped the Commission of its discretion in this regard, and provided that the Commission must cumulate the volume and price effects of imports from two or more countries under investigation that compete with each other and with the domestic industry.

101. The legislative history of the 1984 Act indicated that cumulation was required even for imports with only a "small percentage of total market penetration." The Act creates a limited exception to the mandatory cumulation rule in cases where the Commission determines that imports from a country are negligible.

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95 United Nations, UNDP/UNCTAD, *Analysis of the Results of the Multilateral Trade Negotiations*, pt. I (July, 1979), 62-63, 68.

96 The Canadian Tribunals have found "no-injury" in some very politically sensitive inquiries; for example, *dry pasta from the EEC* (CIT-5-86), *seamless carbon steel pipe from Brazil* (CIT-8-86), *Hyundai autos* (CIT-13-8*7) and colour T.V. sets from Korea* (CIT-13-85), *hot-rolled steel sheet* (NQ-93-008). This is not an exhaustive list, and one obtains a good perception of what is important to the Tribunal from its no-injury decisions. Indeed, the Tribunal's reasons in *hot-rolled steel sheet* provides some rather precise explanations of what the industry's case lacked, in effect giving the industry a clear indication, indeed a road map, of the evidence required to find injury.

97 Cumulation occurs when cases are filed against several countries. Imports from all countries are treated as one group or "en masse" for purposes of assessing the issue of material injury, specifically, the volume and price effect of imports on the domestic industry. It may also involve cumulation from older cases to new ones.

102. The 1984 Act, however, did not specifically require the Commission to cumulate imports from countries subject to threat determinations or imports subject to anti-dumping investigations with those subject to countervailing duty investigations ("cross-cumulation"). The 1988 Act provided authority for the Commission to cumulate imports when rendering a threat determination "to the extent practicable", i.e., if the facts permit them to do so without merely speculating regarding future events.

103. The 1988 Act also permits the Commission to cross-cumulate in threat investigations. The 1988 law provides a near-wholesale exemption for imports from Israel (i.e., they get a separate material injury test of their own). This is due to the U.S.-Israel Free Trade Agreement. There is, as noted earlier, a similar exemption to beneficiaries of the Caribbean Basin Initiative. NAFTA does not extend the same benefits to Canada and Mexico.

104. The Conference Report on the 1988 Act warns the Commission to apply the "negligible" exception narrowly, and suggests that the exception would not apply for imports of fungible or price-sensitive goods.[98]

105. The USA initially used the cumulation concept more extensively than other AD users. Countries that represent less than 1 per cent of U.S. consumption have been made subject to affirmative material injury determinations based upon this cumulation doctrine and their inability to persuade the Commission that a negligibility exclusion would be in order.[99] The EEC also cumulates but excludes countries whose import market share is insignificant or negligible.[100]

106. Canada also cumulates imports and is not generally any less restrictive than the USA. The CITT position on cumulation is set out in *Alpine Ski-Poles from France, Italy, West Germany* and *Norway*, which is, in fact, less rigorous than their current approach.[101] The CITT generally (nearly

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[98] However, in the *flat-rolled steel* cases, the Commission applied the exception in a manner that was more generous than the *de minimis* provisions included in the 1994 AD Code.

[99] See, for example, *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel and the Netherlands*, Inv. Nos. 701-TA-275 through 278 and 731-TA-327 through 331 (Final), USITC Pub. 1956 (1987) (for example, with respect to the standard carnation industry, the ITC found affirmatively against imports from *Ecuador* (0.3 per cent *[*of domestic consumption*)]*, *Costa Rica* (0.1 per cent), *Canada* (0.3 per cent), *Chile* (0.2 per cent), *Mexico* (0.8 per cent) and *Kenya* (less than 0.05 per cent) by cumulating with imports from *Colombia* (52.9 per cent). See Staff Report, Table 45, A-114.

[100] See Besseler and Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, (London, Sweet & Maxwell, 1986), 163.

[101] The Tribunal stated:

> "It is not unusual for the preliminary determination of dumping to encompass a number of dumping countries with great variations among them in volumes exported and margins of dumping determined. Where the ratio of dumped to undumped goods and the margins of dumping are considered significant, the Tribunal considers the injurious effect *en masse* of the dumped goods. Thus, if a country is named as one of the number of dumping countries and its exports are small in volume, but all or most of

always) considers importations of dumped goods en masse.[102] It is not required to do so under either Canadian law nor the WTO ADA. While the WTO ADA mentions cumulation, in effect it does not require it.[103] It is unlikely that the GOC will change its practice; indeed, the WTO ADA codifies and justifies cumulation.

107. There have been a number of Tribunal inquiries where there have been exclusions, not always because imports were negligible.[104] While the Tribunal is not required by law to cumulate imports, their practice is very closely aligned to that of the Commission. Indeed, the Commission may exclude countries at the preliminary phase on grounds of negligibility. The Tribunal has never done so, even, for example, in cases such as *corrosion-resistant steel sheet products* (NQ-93-007) where some of the smaller suppliers exported less than 500 tonnes of subject goods in the period of investigation.[105]

108. The cumulation standard set out in the WTO ADA may be of little value except to get rid of clearly nuisance complaints. It defines negligible in terms of share of imports as being less than 3%, or on a cumulated basis as being less than 7% of imports. It would appear elementary that the proper measure of injury to production in the importing country is *market share* not *import share*.[106] Using import share has a perverse result. In cases where there is a small market share represented by dumped imports in toto, the *de minimis* level, in terms of market share will be much lower than if dumped imports held a relatively high market share. Consider the following example:

If the dumped imports in total have 5% of the market:

a) the 3% of imports threshold represents 0.15% of market share; and
b) the 7% of imports cumulation cap represents 0.35% of market share.

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which are dumped at a substantial margin of dumping then, in the absence of other overriding factors, the Tribunal would not be inclined to exclude that country from an injury finding simply on the basis of the low volume of those exports, a claim often advanced and which has come to be known as the *de minimis* argument." (ADT-5-84)

[102] See *Alpine Ski Poles* (ADT-5-84), where the Tribunal's policy was explained in detail. Note that in *ski poles*, the Tribunal used their reasoning to support a decision to exclude two countries.

[103] The U.S. has excluded Israel and CBI countries from cumulation in AD/CVD actions.

[104] See *Certain Hot-Rolled Carbon Steel Plate* (NQ-92-007), where the Tribunal found no injury from the USA based on U.S. pricing higher than Canadian price levels and declining trends of imports from the USA. As this matter is before a Binational Panel, we will not comment further.

[105] SIMA s. 36 envisages that the Tribunal can conclude in the negative with respect to any of the goods that are the subject of the preliminary injury review. They have never chosen to deal with other than the whole class and all sources.

[106] The E.U. has adopted this approach.

If the dumped imports in total account for 50% of the market:

a) the 3% of imports threshold represents 1.5% of market share;
b) the 7% imports cumulation cap represents 3.5% of market share.

109. It could be argued that it is harder to obtain a "negligible" exclusion at lower levels of market penetration than at higher penetration levels, where local producers may be more vulnerable.

**Uruguay Round Changes**

110. Under the Uruguay Round Agreements Act (URAA), the U.S.:

- changed the home market viability test to 5% of exports to the USA (WTO ADA, Article 2)
- introduced several rules about reasons to use sales at below full cost (WTO ADA, Article 2.2)
- changed rules about profitability of sales to reflect Code requirement (WTO ADA, Article 2.2.1)
- amended U.S. law to ensure costing and allocations reflect actual costs (WTO ADA, Article 2.2.1.1)
- amended U.S. law to reflect WTO ADA requirements with respect to treatment of start-up costs (WTO ADA, Article 2.2.1.1)
- eliminated the arbitrary minima for profits and GS&A expenses (WTO ADA, Article 2.2.2)
- amended provisions about treatment of related party transactions (WTO ADA, Article 2.4)
- amended rules for price comparisons in administrative reviews. Commerce will treat administrative reviews differently than investigations.
- improved provisions for price averaging in an original investigation (WTO ADA, Article 2.4.2)
- introduced provisions to expedite investigations for repeat dumpers (WTO ADA, Article 3.3)
- amended cumulation rules to specify which countries may be cumulated and or cross-cumulated (WTO ADA, Article 3.3)

- defines when captive production may be excluded from consideration (WTO ADA, Article 3.4)

- with respect to causality, the Statement of Administrative Action (SAA) makes it clear that WTO ADA Article 3.5 does not change the standard from that provided in the 1979 Tokyo Round Code and clarifies that the Commission's causation analysis will continue to be guided by the House and Senate Reports on the Trade Agreements Act of 1979. The U.S. considered that its current practice was in conformity with Article 3.5 and no amendments were required.

- amplifies rules about standing of domestic growers and interim processors of agricultural commodities.

- the Statement of Administrative Action in order to avoid speculation and conjecture in threat findings, requires the Commission to continue to use special case in making such determinations (WTO ADA, Article 3.8)

- requires that in regional market cases concentration of imports should be assessed on a case by case basis and states that no precise mathematical formula is reliable in determining the minimum percentage which constitutes a concentration. Each case will have different factual considerations which must be examined on a case by case basis (WTO ADA, Article 4.1)

- introduced a requirement to take positive steps to confirm industry support for a petition, if necessary, through polling (WTO ADA, Article 5.4)

- petition requirements are to be set out in regulations which have not been published yet (WTO ADA, Article 5.2)

- WTO ADA Article 6.1 about questionnaire requirements will be addressed in regulations have not been published yet. SAA indicates extensions will be granted provided information is received in time to permit the agencies involved to analyzed and verify it.

- SAA notes at several places that the due process and the transparency improvements contained in the WTO ADA are important to the USA. Commerce will be required by regulation to provide copies of public versions of petitions to all known experts - or if there are too many exporters to the government of the exporting country.

- The SAA modifies rules about requiring to be filed in a machine readable format to reflect WTO ADA requirements (WTO ADA, Article 6.8, Annex II, paragraph 2)

- modified use of "facts available" by SAA to require corroboration where administering authorities will use facts available to draw an adverse inference (WTO ADA, Article 6.8 and Annex II, paragraph 7)

- introduced sunset review provisions (WTO ADA, Article 11.3)
- required sunset reviews will take account of duty absorption in related party transactions.
- introduced a carefully circumscribed provision permitting (but not requiring) and AD investigation to be initiated at the request of a third country (WTO ADA, Article 14)
- amended anti-circumvention rules.[107]
- SAA directs Commerce to prepare and submit to House Ways and Means Committee and Senate Finance Committee a report on the efficiency, effectiveness and impact on exporters, importers, and domestic industries of different AD (and CVD) duty assessment systems.[108]
- made specific provisions for input and participation by industrial users in injury investigations.
- reduced the time that entries may be subjected to suspended liquidation (this reduces the adverse impacts of the U.S. enforcement system, but does not eliminate them).
- introduced special rules for suspension agreements for economies in transition.
- amended *de minimis* and negligibility rules to reflect WTO ADA.

**The Future**

111. Governments are concerned about the very visible employment effects of industrial adjustment and rationalization. As foreign trade grows, and as foreign products replace domestic at the consumer level, politicians find it difficult to resist demand for more restrictive trade policies. This will not appeal to theoreticians and advocates of laissez-faire but these factors create the realities that politicians must cope with. These political pressures provide the impetus for making trade rules more effective (restrictive), and are not unique to the USA, and we foresee this reality spreading to many other countries.[109]

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[107] The WTO ADA does not explicitly permit such action. This is an issue of differences between Canada and the USA.

[108] This report (originally due January 1, 1996) was not available at the time of writing. It will be very important in the context of differences in the enforcement systems between Canada and the USA.

[109] There are more than 50 countries now operating AD regimes.

112. There are counter influences to these protectionist pressures. Transnational corporations have come to understand the bite of the anti-dumping actions of others. As new countries, particularly the rapidly growing markets in South America, Asia and eventually Eastern Europe, introduce their own anti-dumping laws, those now protected by AD laws will become concerned about the impact of mirror practices on their exports. As U.S. practitioner Gary Horlick has noted on numerous occasions, when counter-actions become more frequent, and when they start seriously to inhibit U.S. trade, perceptions of AD laws in Congress may change.

## IV. CONCLUSIONS AND WTO UPDATE

1. This chapter summarizes the differences in Canadian and U.S. antidumping law and practice as found in the study. It also examines the changes implemented because of the Uruguay Round Antidumping Agreement (referred to as the WTO ADA).[1]

2. Antidumping systems along the lines of existing models will always have a greater impact on Canada than on the USA even if the laws and regulations were identical and all investigators and decision makers were equally enlightened. This is a fact of economic life based on the reality of differences in size of markets.[2] Canada is probably more vulnerable to dumping related injury than the USA because it has a smaller domestic market. At the same time, because Canadian manufacturers in most industries tend to be more export dependent than their U.S. counterparts, they will be impacted more seriously by the uncertainties created by antidumping investigations of their activities and by the imposition of antidumping duties.

3. Canadian concerns about U.S. trade remedy laws, not a new feature of the bilateral relationship, have been expressed more frequently and more vigorously since the Canada-United States Free Trade Agreement (CUSTA) entered into force. However, Canada too has an antidumping law and has initiated more antidumping actions against the USA than the USA has against Canada since the CUSTA entered into force. Canadian sensitivity underlines the difference in impact resulting from being the smaller partner.

4. Elimination of tariffs under a free trade agreement does not make dumping disappear.[3] Freight absorption and freight equalization practices which are more generous in export than in the domestic market are common reasons for dumping. It is clear that for most industries, the best net returns are achieved on sales to customers located closest to their plants or in areas where they can operate with no or limited competition. This explains why shipments of most commodity-type products across borders are technically dumped.

5. One must bear in mind that antidumping laws are designed to address the pricing practices of foreigners which may injure local producers. Many politicians, and most petitioners, view dumping as a form of economic warfare, and respondents view the application of antidumping duties in the same way.

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[1] It was not possible to be definitive about U.S. regulations and practice implementing their WTO obligations, as these had not been finalized at the time of writing.

[2] It should be understood that it is market size and export exposure which determine how onerous AD/CVD systems are. Canadians tend to export more to the USA than Americans do to Canada. This is normal; most U.S. markets are 10 to 12 times larger than corresponding Canadian markets. For example, U.S. Steel producers export about 5% of their production. The Canadian steel industry has exported 30% or more of their production. If antidumping duties close off a market for U.S. exporters in these circumstances, it is inconvenient, or may require a minor shift in focus. The impact on a generally smaller Canadian exporter is at least 10 times as great.

[3] Regular tariffs on Canada-U.S. trade will be eliminated by January 1, 1998.

6. Canadian and U.S. antidumping legislation, regulation and administrative practice have become more harmonized as a result of implementation of the WTO ADA. While transparency has been improved, it would be wrong to suggest that the impact of either system has been reduced or that its effectiveness has been diminished.[4] Indeed, several changes have made it easier to establish injury in both jurisdictions. Specifically, attempts to quantify "negligibility" and to increase the use of margin analysis may have an impact quite different than anticipated by those who sought liberalization through quantification.

7. While amended U.S. regulations were not available at the time of writing, it can be concluded that both Canadian and U.S. systems continue to be effective mechanisms to discipline the injurious impacts of dumping. Based on available information, few substantive differences remain. These differences are reviewed in detail in the study and are summarized in this chapter. The following issues deserve special attention:

- while the U.S. enforcement (duty assessment) system has been modified to reduce the duration of uncertainty, it continues to inhibit trade to a far greater extent than the more predictable Canadian methodology. However, since 1992, in complex cases involving many products or many exporters, Revenue Canada has adopted a modified Commerce approach which has neither the retroactive aspects of U.S. administration and practice nor the same scope to obtain refunds of duties.[5]

- every Revenue Canada investigation involves analysis of costs of production, even if the final decision is to employ domestic/export price comparisons to establish whether or not dumping is occurring. Commerce does not automatically use constructed value methodology. Constructed value investigations may be arbitrary and create uncertainties. Cost allocation and methodology for determining profitability may inflate dumping margins and will nearly always result in higher normal values than domestic/export price comparisons.

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[4] J.J. Schott and J.H. Burrman, *The Uruguay Round: An Assessment*, Institute for International Economics, (November 1994), 85. The authors note:

> "The Uruguay Round reforms have been criticized by some for weakening countries' ability to undertake antidumping actions, and by others for allowing national agencies too much discretion to act against exports. In fact the new rules do a little of both, but do not change to any significant extent the perceived problems with the use or misuse of antidumping measures. More important, the changes do not alter the incentives of domestic industries to resort to antidumping actions instead of other GATT remedies to obtain import relief." They grade the WTO ADA at "C+"., *idem*., 157.

[5] Specifically, *machine tufted carpeting from the USA* (NQ-91-006) and *flat hot-rolled carbon steel sheet products* (NQ-92-008) and *women's footwear* (NQ-89-003). This practice was not affected by the WTO ADA.

- in making domestic/export price comparisons, Revenue Canada must exclude related party transactions and sales to single home market customers. Commerce must test related party transactions to ensure they are not representative before rejecting them, and can accept sales to single customers as a basis for price comparisons. Revenue Canada's practice will tend to result in a greater use of constructed value methodology.

8. Revenue Canada's prospective enforcement procedures are more enlightened and less burdensome than Department of Commerce's (Commerce) retrospective approach but are no less effective in remedying injury from dumping. It is interesting that Commerce is studying Revenue Canada's enforcement system, in part to reduce their heavy administrative cost burden.

9. Many Canadian manufacturers import a broader range of parts and materials than their U.S. counterparts. Canada simply does not and cannot produce everything we need. Antidumping protection, like all protection, is a privilege; it is not a right. The imposition of antidumping duties should be remedial, not punitive. If Canada does not use trade remedy laws properly and very selectively and only when warranted, we will risk creating more problems than we resolve.

10. The cost of access to and participation in antidumping investigations has been driven beyond the means of small business and most medium-size firms in Canada and the USA. Some larger exporting firms have decided to abandon the market rather than accept the administrative and financial burdens of compliance. Cumulation has ensured that there are no rewards for good behaviour, and even countries/companies selling at prices 20 per cent or more above the Canadian complainants get swept into injury findings.[6]

11. If Canada had the same laws and practice as the USA with respect to enforcement, we would likely find that some exporters would abandon the Canadian market. For most exporters, it is easier to walk away from the smaller Canadian market than it is to abandon the U.S. market. It is easier for foreigners to mirror Canadian practices against Canadian exports - many new countries are becoming very important users of AD duties - or to introduce tit-for-tat treatment.[7] If exporters, rather than bear the cost of compliance, decide to abandon the Canadian market, Revenue Canada's procedures will fall into disrepute internationally.

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[6] Cumulation is the practice of considering the impact of all imports under investigation "en masse" in an injury inquiry.

[7] See "WTO Chief tries to Avoid Confrontation", *Financial Times*, December 14, 1995. Also Gary Horlick, *In Analyzing the Dunkel Final Act*, The Commerce Department Speaks (Practicing Law Institute - 1992) noted that 30 countries (counting the E.U. as one) currently employ AD regimes and 12 more countries were considering such laws. There are now more than 50 countries with AD laws. Among these countries are those in Asia and Latin/South America who it is hoped will be important new markets for Canada.

12. The study concludes:

**Public Interest**

Article 9.1 of the WTO ADA urges signatories to impose duties in less than the full amount if this will eliminate injury. Neither Canada nor the USA applies a lesser duty rule; that is, duties are not automatically reduced to a level which is sufficient to eliminate injury. This permits the application of excessive duties and provides windfall protection to petitioners.

Canada has a public interest procedure whereby the Tribunal may recommend to the Minister of Finance that duties not be applied or be applied in less than the full amount.[8] It was envisaged that this procedure would balance the interests of Canadian producers seeking protection with those of downstream producers and consumers. Tribunal recommendations to reduce duties are rare. There is no U.S. counterpart provision.

***Conclusion Number 1:*** ***While the Canadian public interest policy with respect to AD actions is, on paper, enlightened and pro-competitive, it has rarely been used and has not diluted the effectiveness of the SIMA.***

**Standing to Bring a Complaint**

Investigations must be requested by or on behalf of an industry producing the subject goods. WTO ADA rules are designed to prevent initiation of investigations without substantial industry support.

One of the most important WTO ADA changes for Canada is the requirement for significant affirmative support for initiation of an investigation. WTO ADA Article 5.4 has been implemented by the USA in a manner which will eliminate the possibility that producers representing a small share of local production will be assumed to have standing to bring a complaint.[9] The U.S. is moving towards Canadian practice. While Revenue Canada's procedures will not change, their practice has now been reflected in SIMA.[10]

***Conclusion Number 2:*** ***Meeting standing requirements in Canada was more onerous than in the USA, before the WTO ADA. Rules have now been harmonized, and there is less scope for investigations to be initiated by Commerce without substantial industry support. This change was a gain for Canada.***

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8 SIMA s. 45(2).

9 19 U.S.C.A. § 1671 a(c)(4).

10 SIMA s. 31(2).

**Aid to Small Business**

Congress was advised after completion of the Uruguay Round negotiations

> "our trade laws will continue to be our most important and effective response to dumping and subsidies that injure U.S. industries".[11]

Canadian Ministers have provided similar assurances to Canadian manufacturers in order to gain support for general trade liberalization in the periodic GATT multilateral trade negotiations.[12]

As AD systems have become more complex, they have become quite costly and are beyond the means of small and most medium sized businesses. However, it is these smaller producers who may be most vulnerable to dumping. Governments have provided technical assistance and guidance to firms who would be unable to exercise their rights if limited to their own resources. In addition, all petitioners can submit drafts for review and comment in both countries prior to formal filing. This is a common practice which may also help to eliminate unwarranted petitions.

***Conclusion Number 3:*** ***Both Commerce and Revenue Canada will help small petitioners to prepare complaints. While this assistance may appear to encourage investigations, it must be recognized that the complexity of the system often puts access beyond the means of small and medium size businesses who may generally be assumed to be most vulnerable to dumping.***

**Documentation of Complaints/Evidentiary Burden**

The ADA attempts to preclude frivolous demands by requiring that complaints be in writing, and that petitioners provide evidence of:

- dumping;
- material injury; and
- a causal link between the dumping and the claimed material injury.[13]

Both Canada and the USA require that complainants provide details of dumping and injury which are essentially consistent with the WTO ADA.[14] The U.S. will set out their requirements in

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[11] Testimony of Ambassador Rufus Yerxa to the Senate Foreign Relations Committee, June 14, 1994, 8.

[12] For example, when Canada adopted the first GATT (Kennedy Round) AD Code, then Finance Minister, Edgar J. Benson, noted that Canada's objectives were to protect Canadian exports against the unreasonable use of antidumping duties by other countries, and to leave the Canadian government free to apply antidumping duties quickly and effectively when dumping caused or threatened injury to Canadian industry. Government of Canada, White Paper on Antidumping, September, 1968, 5.

[13] WTO ADA, Article 5.1. Note that the evidence must be relevant and shall be "reasonably available" to the petitioner; and WTO ADA, Article 5.2.

[14] *Ibid.*

regulations which were not available at the time of writing.[15] Canada prescribes the information required in a properly documented complaint in the SIM Regulations.[16]

***Conclusion Number 4:*** ***The evidentiary burden on petitioners in both countries is consistent with the WTO ADA. Neither Administration imposes impossible burdens on petitioners who need provide only information they can reasonably be expected to have access to. Self-initiation is possible but has been infrequent in both jurisdictions. Revenue Canada is no more/less inclined to initiate without a complaint than Commerce. This is a neutral factor in bilateral trade insofar as antidumping actions are concerned.***

**Input by Respondents**

A major criticism by potential respondents is that neither Canada nor the USA provide "a full opportunity for the defence of their interests" at the pre-initiation stage.[17] They claim that investigations are initiated on the basis of incomplete or inaccurate information, which could be corrected if there were a better opportunity to respond to allegations.

Commerce may not receive input or comments from respondents except on the issue of standing. Revenue Canada does not reveal the existence of a complaint before initiation.[18] Administrators at Revenue Canada consider that the right to defence begins when the investigation is initiated, not when the petition is being assessed prior to initiation.

Governments of exporting countries are notified by Revenue Canada after receipt of a properly documented complaint and before the decision to initiate. Revenue Canada requests that this notification be treated as confidential. Therefore, in most cases, unless the complainant has publicly announced a filing or their intention to file, potential respondents will not be aware of the existence of a complaint unless and until an investigation has been announced, precluding any opportunity to comment. Further, Revenue Canada will not normally provide access to the non-confidential version of a complaint to potential respondents until initiation, also on grounds that Article 6.2 rights do not begin until an investigation has been initiated. However, in a few cases where petitioners have publicized their intention to file, or the filing, Revenue Canada has taken account of such submissions to shape or reduce the scope of an investigation.

Commerce and the Commission are precluded from disclosing information with respect to draft petitions submitted for review and comment before it is formally filed.[19]

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15 U.S., Tariff Act of 1930 § 732(b)(1) as amended by P.L. 103-465 19 U.S.C.A. § 1671 a(b)(1) does not provide detailed petition requirements.

16 SIMR s. 37.

17 WTO ADA, Article 6.2.

18 WTO ADA Article 5.5 states: "The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation."

19 U.S., Tariff Act § 732(b)(3)(c), 19 U.S.C.A. § 1671 a(b)(3)(c).

***Conclusion Number 5:*** ***Neither Commerce nor Revenue Canada are required to take account of input from respondents before initiating an investigation. Indeed, Commerce may not do so, with the limited exception of determining whether the petitioner has standing. Normally, Revenue Canada will not publicize a complaint until there is a decision to initiate.***

**Preliminary Injury**

In Canada, Revenue Canada has primary responsibility for the preliminary injury determination. This responsibility is exercised by the decision to initiate or not to initiate an investigation.[20] In the U.S., the USITC conducts the preliminary injury investigation. USITC can and does terminate investigations at this stage. Revenue Canada appears to reject about 50 per cent of written petitions as inadequate. There is no comparable information available for Commerce's consideration of draft complaints but it has been suggested by Commerce officials that about two-thirds of draft complaints reviewed are never formally filed.[21]

The USITC procedure is adversarial. The CITT will, on request, review Revenue Canada's file and advise whether or not it contains a reasonable inclination of injury and has in all cases but one, confirmed the decision of the Deputy Minister (Revenue Canada) to initiate an investigation. Revenue Canada does not seek information from respondents; however, as noted above, they will take unsolicited submissions into account when a filing has been publicized.

***Conclusion Number 6:*** ***Because procedures are so different in Canada and the United States, it is difficult to compare their relative effectiveness. However, the USITC preliminary injury review is public and adversarial. Until Canada adopts a similar approach, the U.S. system will appear to be more equitable and procedurally fair.***

**Speed of Relief**

A number of Canadian industries, including the integrated Canadian steel producers, told the Commons Committee on Import Policy in 1982 that it was essential to ensure that under SIMA, timeframes were tight and well enforced to avoid unnecessary delays in receiving relief from injurious import competition.[22]

Normally Revenue Canada issues a preliminary determination of dumping (P.D.) within 90 days of initiation. Commerce's normal timeframe is 140 days. This is 160 days from the receipt of the

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[20] The Deputy Minister, Revenue Canada may also seek the advice of the CITT on this matter SIMA s. 33(2) and s. 34(1)(b).

[21] United States General Accounting Office (GAO), Report to Congressional Requesters, *International Trade: Comparison of U.S. and Foreign Antidumping Practices*, GAO/NSIAD-91-59, (November, 1990), 19.

[22] See for example, submissions to the Sub-Committee on Import Policy by Algoma/Dofasco/Stelco, March, 1981.

petition. Commerce will normally issue a P.D. within 160 days of receipt of a petition. If Revenue Canada uses the full 21 days available to designate a complaint properly documented, and the statutory 30 days between that designation and initiation, then the P.D. will normally be 161 days from receipt of the complaint.

While deadlines in both systems may be extended, extensions are more frequent in the USA than in Canada.

***Conclusion Number 7:*** ***After initiation, Revenue Canada's statutory timeframes provide more expeditions provisional relief from dumping than under U.S. law. Calculated from the time of filing, assuming normal delays, the timeframes are similar.***

**Termination of Investigations**

Both Revenue Canada and Commerce must terminate an investigation if the margin of dumping is *de minimis* (less than 2.0 per cent) or if import volumes are negligible.[23] These criteria are established by the WTO ADA.

Pre-WTO, the U.S. *de minimis* standard was 0.5 per cent. The same standard continues to apply to administrative reviews notwithstanding WTO requirements.

Before WTO ADA implementation, Canada had no formal *de minimis* standard nor any numerical definition of the "not negligible" concept taken into account by the Deputy Minister in terminating an investigation.[24] The 2.0 per cent *de minimis* requirement does not, as a practical matter, change Canadian practice. Revenue Canada will terminate an investigation if there is no dumping (or *de minimis* dumping) at the P.D. In the same circumstances, Commerce will continue the investigation to the final determination (F.D.). If there is still a zero margin at F.D., Commerce will terminate the investigation.

Revenue Canada applies the *de minimis*/negligibility criteria on a country basis. Individual exporters may have zero or *de minimis* margins but will continue to be subject to a finding if the country margin is not *de minimis*. This occurred in several flat-rolled steel cases from the USA.[25]

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[23] Negligible means, in respect of the volume of dumped goods of a country,

(a) less than three per cent of the total volume of goods that are released into Canada form all countries and that are of the same description as the dumped goods,

except that

(b) where the total volume of dumped goods of three or more countries, each of whose exports of dumped goods into Canada is less than three per cent of the total volume of referred to in paragraph (a),

the volume of dumped goods of any of those countries is not negligible.
(SIMA s. 2(1) and WTO ADA, Article 5.8.

[24] SIMA s. 2(1) defines the concept as "insignificant".

[25] Nucor Steel was found by Revenue Canada to be not dumping cold-rolled steel sheet. Bethlehem Steel had zero margins in cold-rolled and corrosion-resistant. National Steel was

However, Commerce excludes *de minimis* dumpers from investigations and further action.[26] Good behaviour is not rewarded by Revenue Canada. The Canadian administrators seem to ignore the fact that companies dump, countries do not. So one might conclude that in Canada, not guilty does not mean acquittal, it means parole with close supervision.

***Conclusion Number 8:*** ***Individual companies which are not dumping, are treated better by Commerce than by Revenue Canada. However, Revenue Canada's procedures permit termination of an investigation against a country because of de minimis dumping earlier in the process.***

**Access to Confidential Information**

Commerce provides access to confidential information to petitioners' counsel subject to a very rigid administrative protective order. Petitioners' counsel in the USA is better able to second guess the investigators and to test the respondents' submissions. Some Canadian exporters consider that this access to confidential information enables petitioners' counsel to play under a pervasive role in a Commerce investigation or administrative review.[27] This adds to the cost of compliance in Commerce investigations and administrative reviews.

Revenue Canada has authority under SIMA to provide similar access to petitioners' counsel.[28] As a matter of administrative practice, they do not do so automatically or with any frequency. Revenue Canada would, for example, grant access if the non-confidential version of the response was inadequate.

While Revenue Canada does not routinely provide access to confidential information, they can and do work closely with petitioners' counsel to ensure investigators understand the target industry. Revenue Canada is receptive to input from counsel, admittedly of a general nature and based on the public record.

Counsel-induced questioning in U.S. investigations is costly and burdensome. Among the comments on Commerce's Advance Notice of Proposed Rulemaking for the URAA is the following:

> "The objective of the antidumping law is to determine whether or not imported products are being sold in the U.S. market at less than normal value. Increasingly, however, the Department's objective appears to be to

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determined to be not dumping in cold-rolled and National Steel corrosion-resistant shipped through Michigan Steel was not dumped. These mills are still subject to the injury findings and, at Revenue Canada's discretion, administrative reviews.

[26] U.S., 19 C.F.R. § 353.21(c) 1995. Final Determination of sales at less than fair value *Sweaters wholly or in chief weight of man-made fibres from Hong Kong* 55 Fed. Reg. 30733, 30744 July 27, 1990.

[27] CSPA memorandum dated January 7, 1994.

[28] SIMA s. 84(3).

> test the outer limits of a respondent's ability to produce and verify information without regard to the relevance of the information, the importance of that information to the underlying determination, the availability of that information to the respondent, or the amount of time it will take the respondent to gather that information. This appearance, in turn, emboldens petitioners to make every escalating requests to expand the Department's investigation. As this leads to increasingly onerous demands on respondents, many either cease cooperating in mid-investigation or ultimately are unable to provide the information requested by the Department. Indeed, many Japanese steel mills have decided the burdens are so great that they simply do not even begin the process."[29]

The U.S. system provides more scope for petitioner input than Revenue Canada's and is much more adversarial and costly at both the investigation and enforcement stages. However, Revenue Canada does not appear to be impaired in its ability to determine dumping or that petitioners' counsel in the U.S. counsel have a major influence on Commerce determinations.[30]

Further, Revenue Canada has only 90 days to preliminary determination and usually 10 to 15 days between receipt of submissions and verification. Commerce has 160 days to P.D., often extends, and verifies only after P.D. and unlike Revenue Canada, can extend the Final Determination period. Providing for input by counsel in Revenue Canada investigations would likely result in delays in obtaining the relief of provisional duties.

The Federal Court of Canada Trial Division noted:

> "Were I to find that the Deputy Minister was required to provide such confidential information on request [which the court did not do] I cannot avoid the conclusion that the whole legislative process would eventually come to a grinding halt, while every complainant requested the confidential information provided to the Deputy Minister in order to make their own calculations of normal value, export price and margin of dumping".[31]

The CITT provides complete disclosure to independent counsel. USITC too provides extensive access to the confidential information collected in their investigations with limited exclusions for trade secrets and highly sensitive information. Independent counsel appearing before the Tribunal receive access to customer names. Commission practice is to provide codes for this information.

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29 Willkie, Farr & Gallagher on behalf of Japan Steel Associations, Letter to the Honourable Susan Esserman of February 3, 1995, 4. Willkie Farr & Gallagher also represented an important Canadian exporter in the *flat-rolled steel* investigations and administrative reviews.

30 Commerce is not bound to accept petitioners' submissions. They also accept respondents arguments. In Binational Panel review USA-93-1904-03, *Certain Corrosion-Resistant Carbon Steel Products from Canada*, the Panel accepted a number of petitioners' submissions which had been rejected by Commerce.

31 Electrohome Ltd. and Deputy M.N.R., CER 11 at 42.

***Conclusion Number 9:*** ***Petitioners' counsel in the USA may monitor Commerce's activities because they have access to the confidential filings of respondents. Counsel involvement may increase cost and administrative burdens on respondents. Similar access is not normally granted by Revenue Canada. It is not clear that granting such access would improve Revenue Canada's ability to determine and calculate dumping. The additional administrative procedures involved in receiving input from complainants would delay provisional relief.***

**Questionnaire Requirements/Verification**

Revenue Canada and Commerce examine the same range of issues in their quest to find and calculate dumping. Both attempt to determine whether there is a difference between domestic and export prices at the ex-factory level. Both follow the WTO ADA guidelines in constructed value investigations. WTO ADA changes have eliminated the scope for using arbitrary or fixed GS&A expenses or amounts for profit. Revenue Canada requires cost of production information in every investigation; Commerce requests it only when they have been persuaded there may be sales at less than cost. A Commerce constructed value investigation requires a specific allegation and evidence from petitioners of sales at less than cost.[32]

While the Commerce questionnaire is more voluminous than Revenue Canada's, it also contains more detailed explanations of requirements and what the information will be used for. Because Revenue Canada verifies before the P.D., they will seek and obtain a significant amount of supplementary information at verification. Commerce has a longer period between initiation and P.D. and they tend to request more information with the initial response.

Commerce's pre-verification instructions to exporters establish a very detailed but logical approach to the verification, seeking the same type of proof/evidence that Revenue Canada investigators do. Revenue Canada investigators rarely provide a pre-verification outline, making verification a less structured and less efficient process. This does not help respondents.

Because the U.S. market is larger than the Canadian market for most products, there is likely to be a greater volume Canadian exports to the USA, more shipments, and consequently more documentation. In part, Commerce investigations are more burdensome because Canadian manufacturers are more export dependent than U.S. manufacturers who export to Canada.

***Conclusion Number 10:*** ***The information required by Revenue Canada and Commerce in investigations is roughly comparable. Revenue Canada automatically requires costs of production information. Commerce does not. In this respect, Revenue Canada's requirements are more burdensome than Commerce's.***

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[32] Tariff Act 19 U.S.C.A. § 1677 b(b)1. If Commerce disregards sales at less than cost in the initial investigations or in the most recent review, they have reasonable grounds to suspect that sales were made at less than full cost 19 U.S.C.A § 1677 b(b)(2)(A)(i).

**Administrative Reviews**

Administrative reviews by Commerce are much more demanding than Revenue Canada's. Revenue Canada operates in a prospective manner, verifies compliance with previous normal value rulings and establishes normal values for future importations. Commerce, on the other hand, has a retrospective enforcement system. Every importation during the period of review must be examined to determine whether there should be an additional collection or a refund. The burden of compliance is significantly greater in a Commerce review.

***Conclusion Number 11:*** ***Because of differences in enforcement systems, Commerce requirements in Administrative reviews are more extensive and more burdensome than in a Revenue Canada review.***

**Use of Best Information Available (BIA)**

A major concern of Canadian exporters is the risk that Commerce will reject their submissions and substitute other information (best information available or facts available) generally with adverse results. There must be mechanisms available to ensure co-operation and to prevent deliberate misinformation. Revenue Canada too has these powers. Canadian exporters argue that Commerce invoked these provisions too easily and for frivolous reasons.

Commerce standards are indeed rigorous but even then are criticized as being lax. The Inspector General of the U.S. Department of Commerce reported in a recent performance audit:

> "the respondent was given from Monday to Wednesday to provide the required documentation. We believe that the efficacy of the test is diminished if the respondent is given so much time to provide the information. This gives respondents sufficient time to fabricate information and defeat the purpose of IA's tests. IA should establish short-term rigid deadlines for data collection".[33]

Revenue Canada too will use BIA if the Deputy Minister does not receive adequate co-operation or is not satisfied with the accuracy of the information received. The general instructions attached to a Revenue Canada Request for Information state:

> "Failure to submit required information by parties requested to respond or to permit verification of any information may result in Customs basing its decision on the best information available at that time. Such a decision might be less favourable to your firm than if full and verified information was available."[34]

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[33] OIG Report, 6.

[34] Paragraph 16, Revenue Canada Request for Information.

This caution is polite, as Canadians would expect their Government's communications with foreigners to be. But this polite warning is an iron fist in a velvet glove.[35] Revenue Canada's numerous statements of reasons in antidumping investigations establish that when they receive inadequate co-operation or a refusal to respond, they will do everything possible to establish a BIA that will "encourage cooperation".[36]

The WTO ADA rules about using Best Information Available are structured and reasonable. Detailed procedures must be followed to encourage compliance and to identify deficiencies in submissions and the BIA used must be based on facts.

***Conclusion Number 12:*** ***WTO ADA changes should discipline some past abuses in the use of BIA***.

**Response in the Official Language**

Investigating authorities must be able to understand the information they are analyzing. Commerce requires replies to its queries in English, and important documents must be translated. Respondents to Revenue Canada may choose English or French. Both authorities employ translators at verification if necessary. Canadian and U.S. exporters involved in Mexican investigations are now very conscious of the costs and burdens of translations into Spanish. As more countries adopt antidumping laws, language requirements will become more burdensome.

***Conclusion Number 13:*** ***Commerce and Revenue Canada requirements with respect to responses being in English (USA) and English or French (Canada) are identical.***

**Sampling Techniques**

In complex investigations involving many products and exporters, investigating authorities may limit the scope of an investigation to a sampling of respondents. Generally, the target group will represent about 60 per cent of imports during the period of investigation. There are few differences in approach between Revenue Canada and Commerce. Companies not included in samples may file submissions and investigating authorities will verify them, time and resources permitting.

***Conclusion Number 14:*** ***Sampling techniques used by Revenue Canada and Commerce do not appear to have a trade inhibiting effect.***

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35 In *dry pasta from Italy*, January 12, 1996, Revenue Canada applied full BIA rates to *6* exporters and partial BIA to one other. One had a late filing and did not provide a non-confidential version, another was in-complete and the remaining *4* did not respond. The BIA rate was 100 per cent - based on the highest margin of dumping found during the investigation.

36 This is an historical approach. If exporters declined to co-operate under the 1904 Canadian law, they would be denied entry to the market.

**Domestic/Export Price Comparisons**

The home market sales used in calculating normal values must be made in the normal course of trade.

Sales between related parties may be rejected as unreliable. Commerce does not reject such sales automatically. Revenue Canada precluded by SIMA from using home market sales to related or associated customers as a basis for establishing normal values.[37] Nor can Revenue Canada rely on sales to a single home market customer in establishing normal values. Revenue Canada rules narrow the domestic market sales base for calculating normal values on the basis of domestic/export price comparisons. The SIMA requirements assume that such sales are not reliable without even attempting to test them.

Commerce is not required to make such presumptions. Under Revenue Canada's administrative practice, inability to use domestic/export price comparisons nearly always results in use of constructed value methodology.

***Conclusion Number 15:*** ***Because Revenue Canada has less scope than Commerce to rely on single customer sales in the exporting country and sales to related parties, use of constructed value methodology, is more likely in Canada.***

**Reliance on Sales Below Cost of Production**

Article 2.2 of the WTO ADA establishes detailed rules for determining when home market sales below cost may be employed in establishing normal values. Revenue Canada's rules are roughly equivalent to Commerce's.

SIMA and U.S. law now provide that cost recovery must be assessed over a reasonable period of time, normally one year. This will be more meaningful than the usual 6 month period of investigation conducted by Commerce, and pre-WTO investigation periods as brief as 3 months by Revenue Canada. There will be greater scope to use some sales at a loss in calculating normal values. However, even with sampling techniques, the burden of compliance (and the cost) will be increased. Extending the period of investigation from six months to a year, doubles respondents' already onerous reporting burden.[38]

The WTO ADA requires that the producer's/exporter's historical cost allocation methodology be respected and that Generally Accepted Accounting Principles (GAAP) in the country of export be accepted (Article 2.2.1.1). These provisions have not specifically been reflected in the revised SIMA nor do the amended SIM Regulations make any reference to GAAP or allocation methodologies. Revenue Canada has been challenged at a Binational Panel for ignoring GAAP prior to the entry into force WTO ADA but was not remanded.[39]

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[37] SIMA s. 15 (a)i.

[38] David Palmeter, Report to UNCTAD, 7-8.

[39] *Cold-rolled steel sheet* CDA-93-1904-08 at 49 and *corrosion-resistant steel shee*t, CDA-94-1904-3 at 26, fn. 35.

Commerce is normally required to calculate costs based on the records of the exporter or producer, if such records are kept in accordance with the generally accepted accounting principles of the exporting or producing country and reasonably reflect the cost associated with the production and sale of the merchandise.[40]

***Conclusion Number 16:*** ***Commerce and Revenue Canada employ similar rules for determining whether sales at less than cost may be used in domestic/export price comparisons. Extending the review period to one year will, however, tend to increase the cost and burden of compliance for respondents in both jurisdictions.***

**Adjustments to Normal Value**

The existence of dumping cannot necessarily be determined and measured by simple observation of domestic and export prices. Each difference in the terms and conditions of sale, as well as the physical qualities of the merchandise must be examined. There are many ways in which terms and conditions of sales made at apparently similar prices may mask dumping. For example, terms in the home market may be 10 days and the foreign customer is given 90 days or more to pay, the home market customer may purchase f.o.b. the factory and foreign customer's price is freight included. There are too many inducements to list here which could influence price.

Exporters may, however, be able to sell in foreign markets for lower prices for a variety of reasons. These include:

- the foreign market requires larger volumes;

- the importer pays by letter of credit at sight while home market sales are made on extended terms; or

- the importer may perform after-sales service or take on other responsibilities on sales in the export market which the exporter must perform in his home market.

The WTO ADA requires that domestic and export price comparisons be:

* fair;
* normally at the ex-factory level;
* at the same level of trade; and
* made as nearly as possible at the same time.

Allowances are to be made in each case, on its merits for a range of differences which effect price comparability, including differences in:

* conditions and terms of sale;
* taxation;
* levels of trade;

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[40] U.S., Tariff Act of 1930 § 773 (f)(i).

* quantities;
* physical characteristics; and
* any other differences which may affect price comparability.

Respondents are to be advised what information is necessary to ensure a fair comparison (obtain adjustments) and the burden of proof imposed must not be unreasonable.[41]

Canadian and U.S. adjustment practices are similar. The onus is on the respondent to justify the adjustments requested. Both investigating authorities will make unfavourable (upward adjustments) to normal value, if the costs incurred in exporting are greater than they are for sales in the domestic market.

**Cash Discounts**

Revenue Canada requires that cash discounts be generally granted (on more than 50 per cent of home market sales). If not, no adjustment will be made. Commerce will adjust for actual discounts granted on home market sales. While cash discounts are small, usually less than 2 per cent, the granting of such an adjustment can be the difference between finding dumping and not, or granting or denying *de minimis* exclusion.

**Deferred Discounts and Rebates**

Revenue Canada's practice with respect to deferred discounts and rebates parallels its requirements for granting adjustments for cash discounts (i.e., that these be generally granted). Commerce will make an adjustment based on actual discounts and rebates granted. Logic argues that if an importer meets the terms and conditions for receiving a cash discount or deferred rebate in the domestic market, their normal value should be adjusted appropriately. Establishing that the generally granted standard - a Canadian requirement not found in the WTO ADA - is quite burdensome and excessively parsimonious.

In its Final Determinations in *corrosion-resistant steel sheet*, Commerce initially allowed deductions for certain rebates, which, while not tied to specific transactions, could be allocated among sales by Stelco. The Department found the adjustments were sufficiently direct because the allocated pool consisted of subject merchandise. However, petitioners argued before a Binational Panel, and Commerce agreed, that there should be a less favourable allocation, and the Panel accepted their submissions.[42] Rebates should be linked to individual transactions to ensure favourable treatment by Commerce. Indirect adjustments are limited by U.S. law to the amount of adjustments to export price or constructed export price.[43] For volume rebates, Commerce examines the rebates granted during the most recent period.

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41 WTO ADA, Article 2:4.

42 USA-93-1904-03, 87-90.

43 U.S., Tariff Act § 773(a)7(B), 19 U.S.C.A. § 1677 (a)7(B).

***<u>Conclusion Number 17:</u> Revenue Canada imposes arbitrary restrictions on adjustments for cash discounts and deferred rebates which may inflate dumping margins.***

**Qualitative Adjustments**

For many reasons including local tastes and customs as well as market requirements, there may be important differences in the physical characteristics of goods sold for export and for home consumption. In the home market a product may be distributed in small shops where packaging and display are important. Some export markets may lend themselves to bulk sales and no-frills packaging. Environmental rules on packaging and solid waste disposal may mean that product configurations or packaging must be differentiated between markets. These differences will be reflected in different costs.

Qualitative adjustments are granted only when there are physical differences in the goods sold domestically and to export markets. The adjustment is based on differences in the cost of production of the goods.[44] In practice, there are no substantial differences between Canadian and U.S. practice with respect to granting or making qualitative adjustments to normal values.

**Trade Level Adjustments**

Differences in structure as between markets often need to be addressed in developing fair comparisons. This is particularly important as distribution patterns change and layers of distribution are either removed or added. In North America, we have seen industries move in both directions. In some consumer goods industries, retailers have reinforced their purchasing functions and have replaced traditional wholesalers or distributors. In other industries, primary producers have decided to focus on production and to delegate their marketing functions to distribution experts. The rate of change in distribution patterns may differ in Canada and the United States. Once again the geographic size of the Canadian market, combined with lower population may have an impact on market structures and distribution methods.

Manufacturers and exporters incur different costs in their dealings with different trade levels. These cost differences must be reflected in the calculation of normal values. The methods used must reflect the complexities of rapidly evolving market structures. Standard designations such as wholesaler, distributor, retailer and end user may not be an accurate reflection of the functions performed and costs incurred. A large multi-store operation with central warehousing, shipping and inventory control is much more like a distributor than a retailer.

Revenue Canada will grant trade level discounts only with respect to functions performed and expenses incurred on home market sales, but not on sales to the importer in Canada.[45]

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[44] If the normal value of the home market product is $120 and the cost is $80 then the normal value of an exported product with a cost of $84 would be $126 (84/80 x 120 = 126).

[45] SIMR s. 5(a).

Commerce will make an adjustment due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in the level of trade -

i) involves the performance of different selling activities; and

ii) is demonstrated to affect price comparability based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.[46]

***Conclusion Number 18:*** ***Adjustments for differences in trade level must be thoroughly documented in both Canada and the USA.***

**Credit and Other Adjustments**

In a number of industrial sectors, notably capital goods manufactured and delivered over extended periods of time, differences in credit terms may mean the difference between obtaining a contract and losing it.[47] Extended credit terms are an attraction to new entrants to a business and to firms which may operate on a speculative basis. The attractions in terms of both total cost to the importer and to cash flow and credit limits are obvious. In other situations, exporters may sell on terms in the domestic market and receive payment for exports by letter of credit at sight. Such sales are attractive to the exporter and improve its financial returns for the sale, or permit lower pricing to reflect the benefits of prompt payment.

The range of possibilities for other differences in the terms and conditions of home market and export sales are extensive. Home market deliveries may be sold out of warehousing stock. Exports, because of distances involved, may be shipped as soon as production is complete. A product sold in the domestic market may carry a branded identity which means nothing in a foreign market. Advertising expenses to support the brand at home will have no relevance abroad. The importer may attach their own brand to a product and incur the marketing and advertising costs necessary to sell the product in their own market. An importer may undertake warranty and after service expense which are the importer's responsibility at home. The domestic market may be supported by an in-house or sales staff or independent commission agents. It is not unusual for importers to seek out suppliers which will reduce the exporter's selling expenses.

Revenue Canada and Commerce have developed detailed procedures and methods for considering claims for adjustments. Exporters must make the case for an adjustment and provide the necessary supporting evidence. All claims are verified before they are accepted. Not all adjustments favour exporters. Should the administering authority, either Commerce or Revenue Canada, determine from reviewing the documentation filed by exporters (and importers) conclude that the exporter incurs greater expenses in exporting than in selling at home, normal values will be increased.

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46 19 U.S.C.A. § 1677 b(a)(7)(A).

47 *Ibid.*

***<u>Conclusion Number 19:</u> Revenue Canada and Commerce will, after verification of relevant evidence, increase or decrease normal values to reflect differences in circumstances of sale. Exporters to both jurisdictions must demonstrate and justify their claims for such adjustments.***

**Treatment of State Trading Economies**

The WTO ADA and the earlier GATT AD codes recognize that it is difficult to use normal methods to address imports from a country which has a complete or substantially complete monopoly of its trade and where domestic and export prices are fixed by the State (STEs).[48] In these special situations, normal values may be established on the basis of domestic sales in a surrogate market economy country.

This methodology has an adverse impact on imports from STEs. With the end of the Cold War and the serious efforts by these countries to become market economies, the rules about how they are treated in antidumping investigations are evolving. In a nutshell, investigating authorities undertake a meaningful analysis to determine whether or not a product originating in such a country is produced and sold under conditions which reasonably reflect the operation of market forces.

***<u>Conclusion Number 20:</u> Imports from State Trading Economies are treated in a similar manner by Commerce and Revenue Canada.***

**Sales to Third Countries**

Investigating authorities may determine that an exporter's domestic selling experience is too limited to provide a meaningful basis for establishing normal values. In such situations, an exporter might sell at very low prices at home in order to avoid dumping charges when selling in foreign markets.

When home market sales are small, investigators try to establish normal values based on costs of production or to determine whether the exporter is selling at lower prices to some export markets than to others.

Commerce will examine export prices to third countries if home market sales do not exceed 5 per cent of the quantity sold to the USA.[49] Revenue Canada may look to third countries in the absence of home market sales[50] but in practice does not do this; nor does there appear to be any inclination to do so in the future. The 5 per cent test is not set out in SIMA or the SIM Regulations. In practice, however, Revenue Canada does employ this volume benchmark. In practice, Revenue Canada is not

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[48] ADA, Article 2:7; and Second Supplementary Provision to Paragraph 1 of Article VI in Annex I to GATT 1994.

[49] WTO ADA, Article 2.2. When the merchandise in question is composed of both finished products and parts, it may be more appropriate to use constructed value. New 19 U.S.C.A. § 1677 b(a)(1)c reflects a change from previous law in that sales must be to a single third country (before several third countries could be used), represent at least 5 per cent of sales to the USA and the price to the third country must be representative.

[50] SIMA s. 19 2(a)

precluded from accepting sales representing less than 5 per cent if a significant number of sales are involved.

The smaller size of the Canadian market could result in much lower volumes of home market sales being deemed representative in a Canadian investigation. Once again, we see how the application of quantitative criteria can lead to absurd results. Revenue Canada must accept, unless there are very compelling reasons, domestic selling experience which will be much thinner than Commerce's requires.

In practice, Canada has not used third country sales to establish normal values. Commerce must consider this option before moving to the constructed value option. Revenue Canada has no such obligation. Therefore, there is a greater tendency in Canada to use constructed value methodology when home market price comparisons are not possible. However, as noted above, Revenue Canada will not be able to reject exporter's home market sales as frequently as Commerce.

Revenue Canada's approach is based on a healthy suspicion of sales to third countries. They are more comfortable basing normal values on measurable and verifiable production costs. This should provide greater comfort to complainants.

***Conclusion Number 21:*** ***When domestic/export comparisons are not a reliable option, Revenue Canada relies on constructed values. Commerce may use sales to third countries to establish normal values.***

**Constructed Value**

One of the most controversial elements of AD practice is the use of constructed value methodology which bases normal values on costs of production. Exporters and investigating authorities engage in extensive debates about the accuracy of costing and the allocation of expenses to particular products. The trend towards product customization makes proper costing and allocation very important. Short life cycle products and world product mandates within trans-national companies for parts, components and finished goods complicates the calculation of constructed values and creates a need for even more detailed international rules and implementing legislation and regulations to guide investigators and administering authorities.

The WTO ADA and implementing legislation in Canada and the USA dedicate much text to constructed value related matters. To a very significant extent these provisions have codified pre-existing Commerce and Revenue Canada practice. Beneficial changes in the WTO include the ban on the use of arbitrary minimum amounts for profit and general selling and administrative expenses.

There are a number of important differences between Revenue Canada and Commerce practice. Submissions from the Canadian Steel Producers Association (CSPA) expressed concern that Commerce averages costs across all plants which a company operates in the exporting country. They note that this disadvantages exports from low-cost plants. It also benefits exports from higher-cost plants.

Revenue Canada, on the other hand, uses costs of production specific to the facility where the goods exported to Canada, or sold for consumption in the country of export are produced. Revenue

Canada considers that they must use the actual cost of production.[51] Revenue Canada's methodology appears to be consistent with the WTO ADA requirement that constructed values "reflect the costs associated with the production and sale of the product under consideration".

Exporters in both countries have experienced problems in developing product-specific financial reports and production costs. Revenue Canada applies home market General Selling and Administrative expense in the constructed value calculation.[52] If GS&A for export is lower than the constructed value will be higher than it should be. The exporter can seek adjustments under the regulations to reflect the differences in sales activities. However, these adjustments may not reflect the full amount of the difference.

Revenue Canada requires and examines cost of production information in every AD investigation; Commerce does not.[53] Constructed value methodology is more unpredictable than domestic/export price comparisons. Constructed value methodology does not normally yield lower normal values than domestic/export price comparisons; in many cases higher normal values will result.

**Treatment of "Other" Costs and Non-recurring Costs**

The WTO ADA calls for special treatment of start-up costs.[54] However, in both countries, costs that cannot be anticipated at the time sales are contracted and without any relevance to current cost of production, may still be included in costs for the period in which they are incurred.[55] This methodology has been upheld by Binational Panels.

Legislative guidance with respect to the allocation of non-recurring costs and start-up costs is similar for Revenue Canada and Commerce. Pre-WTO ADA, both investigating authorities would allocate start-up costs or costs attributable to the subject product for the period in which it was booked.[56]

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51 SIMA s. 19(b) refers to "the cost of production of the goods".

52 SIMA s. 19(b)(ii).

53 While Canada does not employ constructed value in every investigation, cost data is used for the profitability test in every investigation and it is used for adjustments under SIMR s. 5(d).

54 WTO ADA, Article 2.2.1.1

55 CSPA expressed concern about DOC doing this in the last round of steel investigations. Revenue Canada also included one time and catch-up costs in their calculations. However, with respect to implementation of FAS 106, (an accounting rule revision to reflect post-employment benefits) Revenue allocated over a 20 year period. Dofasco objected to this methodology but the Binational Panel upheld Revenue Canada. However, with respect to implementation of FAS 106, they allocated over a 20 year period. Dofasco objected, but the Binational Panel upheld Revenue Canada.

56 See Binational Panel Report in *corrosion-resistant steel* CDA-94-1904-03 Memorandum Re: Deputy Minister of National Revenue Determination on Remand re: B&LE litigation, November 2, 1995 (majority opinion). Also see treatment of the Rockefeller amendment expenses (referred to as the Coal Retiree Act in Revenue Canada investigations) in USA-93-

Revenue Canada and Commerce apply constructed value rules in a similar manner. Both are well schooled in the principles of cost accounting and verification audits.

Attributing the full amount of start-up costs and non-recurring costs to goods in the period in which they are incurred can lead to absurd results. This practice inflates production costs, renders domestic/export price comparisons unreliable and inflates dumping margins. It is a victory for the integrity of accounting standards over common sense. These extreme methods illustrate how AD systems have become captive of the constabulary, and underline the need for reform. But that is not an issue in this study.

**Treatment of Interest Expense/Income**

The financial strengths of exporters differ. A well financed, established firm may not need to borrow working capital. This should have a favourable influence on its costs and competitive position. However, their strength may not be accepted in calculating normal values. The exporter may decide to invest its reserves to earn a higher return and to borrow its daily requirements in short term markets. Interest income or investment income may exceed interest expense.

Revenue Canada is very parsimonious about offsetting interest and financial expenses with interest revenue in profitability analysis and constructed value methodology. All interest expenses are considered to be a charge, yet only interest revenues directly related to the sales of subject goods will be deducted. Interest revenue in excess of interest expense may not be used to reduce costs. Revenue Canada practice has been upheld by Binational Panels.

Commerce procedures with respect to calculating interest expense are very detailed. When DOC determines cost of production (COP), the amount of short term interest expense, less interest income earned on working capital (generally cash and marketable equitable securities (i.e., stocks not held long-term) is used. If a company does not borrow money, no interest expense will be used. If interest income exceeds interest expense, a company will not be permitted to reduce its COP.

In determining the constructed value, the same interest is used as with the COP. An adjustment to the constructed value is, however, made to net out the amount of interest in the credit and inventory carrying costs. This additional adjustment is calculated by multiplying the net interest expense rate calculated for the COP by ratio of the balance sheet total for accounts receivable (and inventory carrying cost if Constructed Export Price (CEP) sales) divided by total balance sheet assets.

For domestic/export sales comparisons, the actual cost of borrowing is used without any deduction for interest income. Factors such as compensating balances, discounting of notes payable, etc., will be considered if they affect the actual cost to the company of borrowing money. If the company does not borrow money, a market rate will be used for credit and inventory cost calculations.[57]

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1904-03 *corrosion-resistant* (63-66). The approaches which Revenue Canada and Commerce adopted were quite similar.

[57] Source: Discussions with former Commerce officials and Commerce Administrative Manual.

***<u>Conclusion Number 22:</u> Revenue Canada and Commerce treat costs of production, including start-up and non-recurring costs, in a similar manner. Cost of production or constructed value methodology may inflate normal values and dumping margins in both jurisdictions.***

**Determination of Export Price**

In order to measure dumping accurately (or to determine that dumping is not occurring), investigating authorities must be able to calculate the export price at the same point in the transaction chain as the home market sales used in the normal value calculation. Differences in terms and conditions of sales and preferential arrangements, including credit terms may influence the export price.

When exports are made to a related importer, both Revenue Canada and Commerce test the reliability of the export price (to ensure that dumping does not result from re-sales after importation at a loss by the related importer). There are, however, important differences in the treatment of related party transactions in enforcement reviews.

When Revenue Canada calculates the export price in a related party transaction, they begin with the first sale to an unrelated party and deduct all costs incurred until they arrive at the net export price. They deduct all costs incurred by the related importer including customer duty, antidumping duty and an amount for profit. Revenue Canada does not permit the reimbursement of antidumping duties. Nor does Commerce.

Commerce does not deduct an amount for profit. The profit is not knowable at the time of importation in the USA because the precise liability for antidumping duty is determined only after the administrative review. Nor does Commerce deduct the amount of antidumping duty, once more because this cannot be determined with precision at the time of importation and resale.

In the USA, there is a greater tendency for the exporter also to be importer of record. While transactions between related parties are possible under SIMA, Revenue Canada looks through transactions involving non-resident importers. In these cases the customer in Canada is deemed to be the importer and will be liable for payment of antidumping duty.

These differences in Canadian and U.S. practice are very important.

***<u>Conclusion Number 23:</u> Under U.S. practice, there is a greater scope for exporters to act as importer of record and to absorb antidumping duties. Because Revenue Canada includes an amount for profit by the importer in its related party export price calculation, antidumping duties will tend to be higher under Revenue Canada's approach than under Commerce methodology.***

**Undertakings/Suspension Agreements**

Exporters who recognize they are dumping, and who wish to avoid the cost and disruption of a full investigation and injury inquiry, may prefer to negotiate a settlement. They may agree to stop exporting, eliminate dumping or to raise their prices to non-injurious levels. There may be a risk

that such agreements could have unintended anti-competitive effects. These provisions are designed to expedite relief for complainants and to reduce the cost and administrative burdens of the process.

Article 8 of the WTO ADA contains the international rules about negotiating price undertakings and suspension agreements. Exporters may, if they wish, request that the injury inquiry be completed after the undertaking is accepted. Should the finding be negative (no injury), the investigation and the undertaking are terminated.

Undertakings (in Canada) or suspension agreements (in the USA), if negotiated in a flexible manner, can permit trade to continue at non-injurious levels. However, there are very rigorous constraints on negotiating undertakings under SIMA, making them unattainable in many multi-company and multi-country investigations. Amendments to SIMA arising out of implementation of the WTO ADA should facilitate the conclusion of undertakings because they may be entered into later in the process, after preliminary dumping margins are known.[58]

Commerce has been reluctant to enter into suspension agreements since the mid-1980s.[59] It is not clear whether or not their practice will change. Since SIMA was introduced in 1984, Revenue Canada has concluded undertakings in 14 investigations, including 10 involving U.S. exporters.

***<u>Conclusion Number 24:</u>*** ***Revenue Canada accepts undertakings from U.S. exporters more frequently than Canadian exporters conclude undertakings with Commerce.***

**Injury Determination Process**

When dumping is discussed, there tends to be more debate about the unfairness of the practice and how the degree of dumping is measured, than about its impact. However, no action may be taken to discipline dumping unless it is established, on the basis of positive evidence, that the dumping has caused material injury to production in the investigating country.

The Tribunal finds injury somewhat more frequently than the USITC.[60] These statistics may not be a good measure because different factors may influence decisions. For example, because Canada is

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[58] Undertakings may now be accepted only after the Preliminary Determination of dumping. Pre-WTO, they could not be accepted after the P.D. The new timing will provide respondents with a better information base. In addition, they will be able to assess their prospects in the injury inquiry before deciding whether entering into an undertaking is desirable.

[59] A notable exception was *Russian uranium* where Commerce concluded a very controversial suspension agreement which linked access for dumped uranium to matching purchases of newly mined U.S. uranium.

[60] Arguably, the CITT and USITC records are roughly equivalent. U.S. commentators, including Gary Horlick have noted that statically the Tribunal and its predecessors have issued affirmative injury findings more frequently than the USITC. Canadians count inquiries individually and the U.S. (GATT/WTO) and other analysts including Michael Finger count decisions by investigation and by country. In Canada, an inquiry involving 12 countries is one inquiry; in the USA, and in Finger's assessment it would be 12.

a smaller economy, Canadian manufacturers may tend to be more vulnerable to dumping than producers in the larger U.S. market.

Canada and the USA are the principal advocates of open and transparent injury determination by independent agencies. The procedures are adversarial, thorough, time-consuming and costly. There are more than 50 other countries which have adopted antidumping laws. Their injury determinations are in virtually every case, internalized, closed procedures, often conducted by the same authorities responsible for investigating dumping.

The CITT and the USITC procedures for determining injury are quite different. The CITT conducts an extensive inquiry seeking information and evidence from all interested parties. Their information gathering culminates in an adversarial public hearing which may last from three days to three weeks.

The Tribunal has the powers of a superior Court of Record.[61] Tribunal Staff seek information from participants in inquiries and from purchasers of the subject goods. The Tribunal Staff does not conduct verification visits to test the information filed. Nor does the Tribunal exercise their subpoena power to compel parties or users of subject goods to complete questionnaires. The Tribunal will, however, invite witnesses not directly involved in the inquiry to appear at public hearings to explain the dynamics of the market.

The USITC procedures are more investigative, with greater emphasis on written submissions and staff investigation than on public hearings and testimony. The USITC conducts an investigation. It places no onus on either side. However, whatever the process, should a party wish to prevail, it behooves them to ensure that the investigators, analysts and judges have a proper and verifiable information base.

Canadian petitioners have been very critical of the more trial-like Tribunal process where their senior executives are subjected to extensive cross-examination by those opposed in interest. The Tribunal (like the USITC) must determine whether dumped imports have caused or threaten to cause injury to domestic production.[62] This requires an inquiry into the state of the industry. Domestic producers are in the best position to provide information on the various indicia which must be examined. The Tribunal routinely requests importers to provide very detailed information about their sales which can be tested by petitioners' counsel. Fairness and equity, and the costs imposed on other parts of the economy argue for a thorough testing of all claims and evidence. Tribunal procedures have been shaped by court decisions which permit respondents to know the evidence against them, to test it and to reply.[63]

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[61] CITT Act s. 17(2).

[62] In *caps, lids and jars* (NQ-95-001) the Tribunal established a new basis for its injury determinations. It is now sufficient for the Tribunal to conclude that the dumping has caused *or* threatens to cause injury. Prior to that inquiry it had been Tribunal practice to examine past, present *and* future injury. In the absence of a future injury (threat) finding, no duties could be imposed.

[63] The Federal Court in *Magnasonic* stated in this connection:

> "It appears clear, however, that the reason for the existence of the Tribunal was that Parliament sought, not only a means whereby to keep out dumped

Canadian manufacturers contrast their experience before the Tribunal with the very brief public hearings before the USITC. The Commission's investigations are more extensive than the Tribunal's. The USITC process relies more heavily on detailed written submissions and the extensive record generated by the Staff. The Commission Staff also verifies the information provided. While the Tribunal staff does probe inconsistencies and apparent errors, they do not visit information providers to audit their responses. The record is tested through questioning and cross-examination of witnesses at the Public Hearing.

***Conclusion Number 25:*** ***Both the U.S. and Canadian injury determining systems can impose onerous requirements on participants. The Canadian system depends on lengthy public hearings and cross-examination, while the U.S. system depends more on the development of an extensive written record prior to very brief oral hearings.***

**Injury to Production/Definition of Industry**

The WTO ADA requires, as a precondition for the imposition of antidumping duties, that the dumped imports be causing material injury or threatening material injury to a domestic industry.[64] Industry is defined as the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production.[65]

While material injury to less than the entire industry will suffice to support an affirmative finding, the Tribunal and the USITC do not limit their analysis of the domestic industry to complainants or supporters of the complaint. The industry "in toto" is analyzed. However, in both countries, injury to producers accounting for less than 50% of the production can result in an affirmative injury finding.

***Conclusion Number 26:*** ***The CITT and USITC are required to consider the condition of all producers when assessing material injury. However, in both countries, injury need be shown only to a major proportion of the domestic industry. This proportion can be less than 50 per cent, indeed, as low as 25 per cent. The WTO ADA has not changed this situation.***

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> goods when their importation would do injury or retard production, but also a means whereby dumped goods would not be kept out when their importation would not do injury or retard production (and would, therefore, presumably provide Canadian customers with cheaper goods without doing any harm). Otherwise, that is, if Parliament was not concerned about the danger of keeping out dumped goods unnecessarily, the statute would have simply prohibited all importations of dumped goods."

(*Magnasonic Canada Ltd. v. Antidumping Tribunal* [1972] FC 1239, October 5, 1972, 30 D.C.R. (3d), 125/126.)

64 WTO ADA, Article 3, note 9.

65 WTO ADA, Article 4.1.

**Injury in a Regional Market**

The WTO ADA envisages that in very limited circumstances, antidumping duties may be imposed to address injurious dumping in one or more regions within a national territory.[66] Because of the nature of this derogation, the rules very carefully define the circumstances for invocation, in order to prevent abuse.

Canada has used this provision primarily for agricultural products in Western Canada and for imports of beer into British Columbia. Efforts to meet the regional market test for other products including *solid urea* and *fertilizer spreaders* failed. The USA has invoked the regional test for a range of products including *refined sugar* and *cement*.

"Regional industry" is defined as "the domestic producers within a region who are treated as a separate industry" under the U.S. Uruguay Round Agreements Act (URAA). The USITC will find a "concentration" of imports "if the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market, and if such imports into the region account for a substantial proportion of total subject imports entering the United States". According to the Statement of Administrative Action (SAA), the USITC must assess import concentration on a case-by-case basis, cautioning that no "precise mathematical formula" is reliable in making this assessment.

U.S. Uruguay Round implementing legislation (URAA) has added a new provision that affects regional industry considerations. This provision instructs the USITC to focus on the volume and effect of the subject imports entering the relevant region and not the nation as a whole when it cumulatively analyzes subject imports from various countries.[67]

***Conclusion Number 27:*** ***There are no significant or practical differences in the Canadian and U.S. approaches to establishing the existence of regional markets and material injury to producers in regional markets.***

**Treatment of Captive Production**

In some industries, intermediate products may be sold both as an end product or used in further manufacturing processes. An example is cotton yarn which may be sold in the merchant market or used in integrated production facilities to knit fabrics. In the flat-rolled steel sector, hot-rolled coils may be sold and used as is or may be further processed into cold-rolled or corrosion-resistant steel.

The issue arises as to whether injury should be assessed on the basis of total production of the product in question or only that portion sold in the merchant market. In the former case, dumped imports will represent a lesser share of total consumption - and it may be more difficult for domestic industry to make their injury case.

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66 WTO ADA, Article 4.1.

67 19 U.S.C.A. § 1677(7)(G)(iv).

In *cold-rolled steel sheet*, the Tribunal explained:

> "Consistent with previous decisions, the Tribunal determined that both internally transferred goods for further manufacture (furtherance) and goods sold in the Canadian market must be considered part of the domestic production for purposes of its injury inquiry. In determining if dumping caused material injury, however, the Tribunal focused principally on those indicators relating to sales in the domestic market. They include trends and levels of imports and market shares, prices and financial performance".[68]

The USITC has been given detailed instructions by Congress about the treatment of captive production. The USITC examines the condition of the U.S. producers of the domestic like product as a whole when determining whether material injury resulted from unfair imports. The agency will consider the effect the subsidized or dumped imports have had on the total production of the domestic like product, including certain qualified, captively produced goods.

Qualified captive production exists when:

- domestic producers internally transfer "significant volumes" of the domestic like product as the predominant material in the production of a different, higher-valued downstream product; and

- when the domestic producers transfer "significant volumes" of the same domestic like product to unrelated customers in the merchant market which are generally not for use as a material in another product.

A downstream product is a product that is separate and distinct from the product incorporated into it. The USITC will consider a material predominant if it is used as the primary material in the manufacturing of the downstream product. Finally, the agency will determine the meaning of "significant volumes" of captive and merchant production on a case-by-case basis.

The URAA directs the USITC to "focus primarily on the merchant market for the domestic like product" for purposes of calculating market share and ascertaining the factors affecting financial performance of the industry.

When the new captive-production provision applies, the USITC must determine whether subject imports are captively consumed by a related-party importer for use in the production of a downstream product. If these captively produced imports do not compete with domestic like products in the merchant market, such imports must be excluded from USITC calculations that also exclude domestic captive production. An example of the type of calculation captive production would be excluded from is the calculation of merchant market share.[69]

***<u>Conclusion Number 28:</u> Canadian and U.S. practice with respect to considering captive production used in downstream processing have been harmonized.***

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[68] CITT, NQ-92-009, 19.

[69] Tariff Act 1930 § 771(7)(c)(iv).

**Imports by Petitioners**

Article 4.1 of the WTO ADA provides that domestic producers who are related to exporters of dumped goods or who import dumped goods may be excluded from the domestic industry. This is done to ensure these companies do not frustrate the application of antidumping law by skewing the injury analysis or by withholding support for an investigation.

SIMA provides that such producers may be excluded from the scope of the domestic industry.[70] For greater clarity, SIMA elaborates that:

> "... a domestic producer is related to an exporter or an importer where
> (a) the producer either directly or indirectly controls, or is controlled by, the exporter or importer,
> (b) the producer and the exporter or the importer, as the case may be, are directly or indirectly controlled by a third person, or
> (c) the producer and the exporter or the importer, as the case may be, directly or indirectly control a third person,
> and there are grounds to believe that the producer behaves differently towards the exporter or importer than does a non-related producer."[71]

U.S. legislation amended to reflect the WTO ADA harmonizes the definition of "related parties" with the language of the ADA.[72] Related parties are producers protected from the impact of unfairly priced imports through a relationship with foreign exporters. The related party provision gives the USITC the discretion to exclude related-party domestic producers when it defines the domestic industry for purposes of determining injury. The Statement of Administrative Action points out that the new definition codifies existing USITC practice:

> This definition of related parties is consistent with current USITC practice of considering the following factors as evidence of a relationship: (1) common corporate ownership between an importer or exporter and the domestic producer; (2) a special relationship between an importer and a domestic producer who is a purchaser, although not an importer of record, of the subject imports; or (3) control of a purchaser of large volumes of the subject imports by a domestic producer.[73]

***<u>Conclusion Number 29:</u> Neither Canada nor the USA is likely to permit related party dumping or imports of dumped product by part of the industry to frustrate granting relief from injurious dumping.***

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70 SIMA s. 31(3).

71 SIMA s. 31(4).

72 Tariff Act 1930 § 771(4)B.

73 SAA.

**Import Trends**

Article 3.2 of the WTO ADA requires that the investigating authorities consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. This factor does not give decisive guidance but if imports are declining in absolute terms, and as a share of consumption, the investigating authority must determine why.

While declining imports raise questions about the impact of dumping, it must be recognized that the domestic industry has two basic choices when addressing such import competition. It can reduce prices to hold or increase its market share or it can maintain prices and lose volume.

In periods of reduced economic activity, local industry can reduce prices to replace imports. Exporters may respond to protect their share of the foreign market share by their own price adjustments. This may result in a situation of "follow-down" dumping. While meeting prices is an acceptable defence under Competition law, the Tribunal's quite different approach was enunciated in *soda ash* (and repeated in other inquiries), when they stated that the domestic industry:[74]

> "...could anticipate that competitors would follow [prices down] but it was entitled to assume that its competitors would not cross the line into injurious dumping".

This approach gives domestic producers considerable scope to use antidumping law to recapture market share in periods of economic downturns.

***<u>Conclusion Number 30:</u> It is not unusual for findings of injury to be made in Canada and the USA in situations of declining or stable imports based on findings that petitioners have suffered price, margin and profit suppression because they reduced prices to safeguard or increase market share against dumped import competition.***

**Price Undercutting/Underselling**

The WTO ADA requires investigating authorities to determine and consider whether there has been a significant price undercutting by the dumped imports or whether the dumped imports have depressed prices to a significant degree or prevented domestic producers from raising prices to a significant degree.[75] Both the Tribunal and the USITC take this task seriously.

If dumping is used to secure or increase share in a foreign market, price competition should be a good indicator of the impact of the dumping. If the dumped product is sold at a premium in the

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[74] Commercial Grade Sodium Carbonate, commonly known as *Soda Ash*, Originating in or Exported from the USA, ADT-7-83, July 7, 1983, 12.

[75] Article 3.2.

foreign market, there may be factors other than price which explain its success. And if domestic prices do not decline, it is difficult to measure injury.

Injury analysis is seldom easy. Markets and distribution systems do not always respond in a predictable or rational manner to new entrants. Nor do consumers. The new product, albeit dumped, may sell at a premium to domestic goods, or it may stimulate additional demand in a moribund market.

For most products, it would be reasonable to expect that established players in the market would be displaced by price competition. Assessing the impact of this price competition and the importance of dumping in obtaining sales and influencing price levels requires detailed analysis of transactions.

The Tribunal and the Commission attach important weight to evidence of price undercutting and underselling. The simple absence of such evidence does not, however, result in a negative injury finding. It cannot be assumed that domestic producers will not respond to price competition. Very often they so in order to retain their established customer base. The injury indicator then becomes price suppression. Price suppression is often easier to measure by analyzing changes in gross margins.

It is difficult to determine without detailed price surveys and investigations who initiated price cutting - and who followed. The Commission conducts detailed investigations, seeking information from customers for the product to determine whether or not price undercutting exists and the frequency of such activity. The Commission and its Staff have detailed authority to demand and compel co-operation and the provision of evidence and documentation.[76] Commission Staff verifies the information in the record.

***Conclusion Number 31:*** ***Competition at individual accounts is an important element of the analysis undertaken by both the Tribunal and the Commission. If the Tribunal exercised its powers to compel production of evidence, the quality and completeness of their record could be improved. The Tribunal is reviewing its requirements and procedures to streamline the process and make it more cost efficient.***

**Margin Analysis**

There may be injury which is greater or less than the margin of dumping or price undercutting. Analysis of the precise impact of the dumping, through the margin, may lead the Tribunal or the Commission to modify or alter their conclusions. It could be even after that the addition of an antidumping duty to the export price the imported product may still be sold at a price well below domestic levels. Imposition of an antidumping duty would not raise the petitioner's prices nor increase its volume. Arguably, in this case, factors other than dumping have caused the injury.[77]

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[76] Tariff Act 1930 § 777(7).

[77] The Tribunal so found (with respect to subsidies) in *carbon steel seamless pipe from Brazil* (CIT-8-86).

The Uruguay Round amendments require the USITC to consider the "magnitude of the margin of dumping" as a factor in determining injury to a domestic industry in an antidumping investigation. The relationship, if any, of the margin determination by Commerce to the USITC injury test has been quite controversial both with the Commission and internationally. A GATT panel affirmed the Commission majority's refusal to take margins into account in making its injury determination.

Some USITC Commissioners have held that the unfair imports themselves were to be assessed as the potential cause of injury, and the only purpose of the margin calculation was to determine the amount of duty deposit necessary to offset the injury. The opposing view relied principally on the Article 3.5 WTO ADA injunction, also part of the GATT Antidumping Code, that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping ... causing injury with the meaning of this agreement". This view holds that the injury had to be tied directly to the dumping through the margin.[78]

The Tribunal has attempted to use margin analysis in some inquiries, as well as econometric analysis to segregate dumping impacts which are based in part on the magnitude of the margin. This is not a new procedure driven by the WTO ADA. The Tribunal has undertaken such analysis frequently during its history.[79]

The Tribunal and USITC have used econometric analysis to assist in their inquiries and investigations. Econometric models have been helpful to the Tribunal when addressing agricultural products such as *grain corn* and *boneless beef*.[80] While both investigations addressed the impact of subsidized imports, there would have been little difference int he analysis had the unfair practice at issue been dumping.

***<u>Conclusion Number 32:</u> Inclusion of a requirement to consider the magnitude of the dumping margin in the WTO ADA and in the Canadian and U.S. law should improve the quality of injury analysis.***

**Cumulation**

Both the Tribunal and the USITC assess injury on a cumulative basis. Both bodies cross-cumulate the impacts of dumped and subsidized imports. The practice is virtually automatic in both countries (although the USITC has discretion not to cumulate in threat of injury determinations). The negligibility standards in the WTO ADA require exclusions from cumulation for small market players. Because these criteria are based on shares of imports, they have the perverse effect of

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78 Michael Stein, formerly General Counsel, USITC. Discussions with the Author, See also Mr. Stein's comments on *Implications of the Uruguay Round Agreement in the Commerce Department Speaks*, (1994, The Practicing Law Institute), 877.

79 See *colour TV sets from the Republic of Korea* (CIT-13-85), *hot forged steel scissors and shears from Italy* (ADT-9-80).

80 *Subsidized grain corn from USA* (CIT-7-86), *subsidized boneless manufacturing beef from the EEC* (CIT-2-86).

permitting greater exclusions as the share of dumped imports in consumption increases.[81] The E.U. has introduced criteria based on market share - less than one per cent individually and less than 3 per cent cumulatively. In many cases the E.U. methodology will be more generous than either Canadian or American.[82]

The USITC may not cumulate imports from Israel unless these imports have themselves caused material injury. Caribbean Basin Initiative (CBI) countries are also excluded from initiation by the USITC. As a practical matter, imports from these countries are not likely to be particularly large nor particularly injurious.

The USITC cannot cumulate imports from exporters who are not dumping. The Tribunal examines imports en masse so their practice is less clear on this question. Canada excludes countries from cumulation, not individual exporters. The Tribunal has, however, in analyzing the impact of imports from within a country attached weight to the existence of significant volumes of undumped imports.[83]

***Conclusion Number 33:*** ***The Tribunal and USITC examine injury on a cumulative basis. Individual exporters in the USA who are not dumping will be excluded from U.S. investigations. The Tribunal does not do so automatically.***

**Factors Other than Dumping**

The WTO ADA attaches importance to the examination of factors other than dumping which may be causing injury. Injury caused by or attributable to these "other" factors may not be attributed to dumping.

Canada has given enhanced importance to this requirement by specifically requiring in the SIM Regulations that:

> "i) the volumes and prices of imports of like goods that are not dumped or subsidized,
> ii) a contraction in demand for the goods or like goods;
> iii) changes in patterns of consumption of the goods or like goods,
> iv) trade-resistant practices of, and competition between, foreign and domestic produces,

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81 In a situation where the local industry is dominant, say with a 90 per cent market share, the cumulative negligibility threshold is 0.7 per cent of consumption (not more than 0.3 per cent for any individual country). If imports have 60 per cent of the market, the thresholds are 4.2 per cent and 1.8 per cent respectively.

82 For example, in a situation where a market was 33 per cent imports 3 per cent of imports will be less than 1 per cent of consumption, and 7 per cent of imports will be 2.3 per cent of consumption. At the cumulation borderline 3 per cent of consumption this will be better than 7 per cent of imports until imports account for 42.5 per cent of consumption.

83 *Colour TV sets from the Republic of Korea* (CIT-13-85).

v) developments in technology, and
vi) the export performance and productivity of the domestic industry in respect of like goods"[84]

Those charged with determining injury do not have an easy task in analyzing these criteria. Developments which may cause injury not related to dumping may also render the dumped on industry more vulnerable.

It is clear that problems caused by imports which are not dumped may be addressed only under general safeguard provisions.

If there is a general decline in demand, this may cause injury which has not been caused by dumping. However, there is a tendency to conclude that in periods of reduced economic activity, domestic producers are more vulnerable to dumping even if dumping is not a new phenomenon.

The competitive structure of the market does not unduly inhibit the prospects of obtaining an affirmative injury finding. Injury has been found to both monopolies and very tight oligopolies. An industry undergoing technological change too may be vulnerable to dumping in its shrinking market.

Did the drafters of the WTO ADA mean that dumping of a technologically advanced product should not be deemed to be injurious? Why should the improved product be dumped if it is better? At the same time, should the technologically challenged be protected or should they be abandoned?

How does the injury analyzer address a situation where a complaining industry has itself dumped, and been denied access to their foreign market by antidumping duties or if the export market has been lost through some other type of trade action? Loss of export markets will generally mean underutilization of capacity and higher costs at home. The WTO admonition appears to argue that protection against dumping would be denied in these cases. This could lead to absurd situations, particularly in periods of reduced economic activity.

These admonitions are included in the ADA for good reason. However, strict adherence to these rules could deny production against antidumping duties to those most in need of that protection. Neither the international rules nor domestic legislation in Canada and the USA require petitioners for protection to be operated or be managed as efficiently as possible.

***Conclusion Number 34:*** ***The WTO ADA attaches greater weight to the analysis of factors other than dumping than previous AD Codes. Injury attributable to these "other" factors is not be attributed to dumping. However, these same factors may increase vulnerability to dumping. Both the Tribunal and the Commission are inclined to take account of this vulnerability. Appropriate weight is given to the state of "thin skull" petitioners.***

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[84] SIMR s. 37(3).

**Enforcement**

Enforcement methodologies and related administrative reviews are the most significant difference between the Canadian and U.S. systems. Canadian exporters are very directly affected by enforcement because in many cases when exporting the USA, they must act as non-resident importers, selling to their American customers on a landed duty paid basis. Therefore, the Canadian exporter bears the risks of future and retrospective assessments by U.S. authorities.

Revenue Canada's normal prospective approach to enforcement permits exporters to raise prices to eliminate dumping. This policy encourages predictability for both exporters and Canadian users of these imports while ensuring that Canadian producers no longer face dumped import competition. Suggestions that Revenue Canada's enforcement perpetuates dumping are ill-informed and wrong.

Commerce operates a retrospective enforcement regime. U.S. customs collects deposits in the amount of estimated dumping. Commerce conducts very extensive administrative reviews which may result in refunds of deposits or additional collections well after the goods have been sold and used. There is considerable uncertainty and the administrative reviews are very onerous as duty liability must be calculated for each importation. Commerce requirements, in an administrative review are very burdensome for exporters, particularly those who also act as importer of record. Because there is a potential liability or refund for each unliquidated entry, all entries must be examined - and domestic selling experience provided. Revenue Canada, on the other hand, reviews imports and domestic sales over somewhat shorter time period in order to update normal values (and to determine whether previous imports have been properly valued and paid for).

A larger volume of exports to the USA may also add to the compliance burden of Canadian exporters. Commerce employs different methodology in reviews than in the original investigation (e.g., averaging methodology which could increase the scope for finding dumping).

As noted above in the analysis of export price calculation, antidumping duties may be absorbed in transactions between related parties in the USA. Revenue Canada does not permit either the reimbursement or absorption of antidumping duties.

***Conclusion Number 35:*** ***The U.S. retrospective enforcement system creates uncertainty and unpredictability which exporters to the U.S. find frustrating. The scope for retroactive assessment of duties can may frustrate exporters. Revenue Canada's prospective approach is effective in achieving the object and purpose of the SIMA which is to eliminate the injurious effects of dumping. Canadian law and practice more effectively prevents the absorption of antidumping duties by related parties.***

**Sunset Clause**

In 1984, Canada introduced a requirement to review all affirmative injury findings within five years of the date they are made.[85] If a review is not initiated within five years of making the finding, the

[85] SIMA s. 76(5). The Tribunal had the authority to conduct reviews prior to the SIMA amendment, and there were frequent reviews under the Antidumping Act provisions. The SIMA provision provided a more specific time line for such reviews requiring specific action to extend a finding beyond its initial five year term.

finding expires. Such reviews do not mean automatic rescission. Findings may be extended for further periods of five years. There is no restriction on the number of extensions possible.

Before the Uruguay round rules were implemented by the USA, AD orders levying duties on imports determined to be injurious to a U.S. domestic industry were of indefinite duration. Removal of an AD order occurred only when certain conditions were met that would ensure that the subject imports no longer were sold at below fair value. USITC's authority to revoke orders because injury had ceased was rarely employed because the Commission's standard for revoking orders was so difficult to meet. As long as dumping continued, an order would remain in effect if the domestic industry wished it to.

U.S. law now requires all AD orders must be reviewed at least once every five years to determine whether such orders remain necessary.[86] Under this sunset provision, the imposition of antidumping duties will be reviewed no later than five years from the date of:

- the imposition of the duty;
- the most recent review covering both the determination of whether an unfair trade practice existed and whether a domestic industry suffered injury;
- the most recent sunset review.

The Commission must determine whether revoking, suspending, or terminating the order would likely lead to the continuation or recurrence of the injury caused by the subject imports. This may not be an easy task. The statute provides an elaborate framework for making this determination, paralleling in large part the steps that are to be taken in an initial investigation, with the exception that here, of course, the Commission must predict what is likely to happen if the order were to be revoked.[87]

The amount of information the Commission is likely to require from the parties to fulfil its statutory responsibilities is immense. The statute requires the Commission to begin its analysis with its prior injury determination and, then, to consider whether there has been any improvement in the industry's condition. If there has been improvement, the Commission must determine whether that improvement is related to the existence of the order. The Commission then is to make a determination whether the industry is vulnerable to material injury if the order is revoked. Therefore, the Commission record will have to include the record in the earlier investigation to provide a baseline and a detailed examination of the current state of the industry to determine improvement and vulnerability.[88]

Next, the Commission must examine the volume of imports during the period the order has been in effect and forecast likely volumes if the order is revoked. In estimating likely volumes, the

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[86] 19 U.S.C.A. § 1675(c), Tariff Act 1930 § 751(c).

[87] 19 U.S.C.A. § 1675a(a), Tariff Act 1930 § 752(a).

[88] Michael Stein, Dewey Ballantine (Washington, D.C.). Discussions with the author.

Commission must examine foreign capacity, inventories, and potential to shift production from other products into the product under investigation.

In evaluating likely price effects, the Commission is directed to determine whether there is likely to be significant price underselling or price depression or suppression after a revocation.

The USITC is expressly directed to recognize that the effects of revocation or termination may not be imminent but may manifest themselves only over a longer period of time. This suggests Congress considers that a sunset injury determination is not the same inquiry as an ordinary threat of injury determination.[89]

The statute does not permit revocation of any orders until five years after the legislation has gone into effect. It will be the next century before the questions and doubts regarding U.S sunset reviews can be answered.

***Conclusion Number 36:*** ***U.S. law has been amended to provide for a sunset review of outstanding injury findings. The Commission has been given very detailed instructions about how to conduct their reviews. It remains to be seen how the U.S. sunset review system will work. There was much concern among U.S. users of AD law about eliminating protection prematurely. However, some Tribunal findings have been reviewed and extended twice. Clearly, a sunset review does not mean automatic rescission in Canada. Nor should we expect this will be the case in the USA.***

89 *Ibid.*

## V. THE PLAYERS

1. Both Canada and the USA have bifurcated antidumping processes. Revenue Canada is responsible for preliminary injury assessment investigation of and calculation of dumping and for enforcement. In the USA, Commerce has the responsibility. The Canadian International Trade Tribunal's basic role with respect to AD matters is to conduct preliminary injury analysis definitive injury findings and reviews of the need for continuation of affirmative injury findings. The U.S. International Trade Commission is responsible for injury investigations in the USA.

2. The bifurcated processes that apply in both Canada and the United States separate the functions of the constabulary and the judiciary. In some jurisdictions (e.g., the European Community, now the European Union (E.U.)), the same agency undertakes both functions. The lack of transparency in the European system and complaints about arbitrariness (from the USA, Canada and others) and more explicit WTO rules about injury determination may move the E.U. towards a bifurcated process. Meantime, many new countries introducing AD regimes have adopted the E.U. model.

3. The division of functions in itself is not trade restrictive. Nor does this make one system more or less restrictive than the other. Open and transparent systems are preferable. In this regard Canada and the United States operate more or less transparently.[1] The way they conduct their affairs and functions under the law may have such effects; indeed, this appears to be the case.

### Canada

#### Revenue Canada - Anti-dumping and Countervailing Division

4. The Anti-dumping and Countervailing Division of Revenue Canada is responsible for determining dumping and for enforcing findings. The Director General of the Division directs the work of three line directorates two of which are responsible for issues on commodity lines, and the other for policy matters.

5. The Director General reports to an Assistant Deputy Minister (A.D.M.). While the Deputy Minister (D.M.) has numerous powers under the SIMA, many of these are delegated to the A.D.M. and to the Director General.

6. There are 75-80 professional staff, most of whom are trained in economics and accounting. The Division has access to Department of Justice lawyers attached to Revenue Canada. The Legal Division provides the Division with day-to-day advice and interpretation.

7. There are concerns that organizations that are based on industry-specific responsibilities can lead to officials becoming "captive" of their client industries. Commerce refers to an organizational structure along commodity lines as a "luxury". However, the Department of Commerce Inspector

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[1] A Brazilian target of a Canadian AD investigation once claimed transparency only allows one to see the piranhas eating them and that this is little comfort.

General, in an audit of the Import Administration's (IA) performance in the recent flat-rolled steel investigations, was very critical of the IA's lack of commodity-based expertise.[2]

8. The Division has foreign offices in Tokyo and Brussels, which are staffed on a rotational basis by officers who become familiar with commercial practices in their geographic areas of responsibility. These geographic areas go well beyond the countries in which the officers are located.

9. Revenue Canada's investigative procedures have over time become more detailed and complex. Questionnaires have become longer and more detailed - and the documentary requirements are more extensive. Its staff requires greater expertise and a higher level of professional competence.[3] To this end, the Department offers a wide range of professional development training.

10. The Division's organization along commodity lines and staffing with experienced investigators is an important benefit to Canadian users of the program. Investigators are familiar with products and have developed close working relationships with Canadian industries who use the anti-dumping law most frequently. This is a matter of some considerable concern for respondents.[4] As we will see in the next section, lack of commodity specialization at DOC in the recent steel investigations was criticized in an Internal Audit by Commerce's Inspector General.[5]

11. Complainants are generally satisfied with the abilities and dedication of the Anti-dumping and Countervailing Duty Division Staff. Most strive to be objective in their approach to administration of the legislation. However, there is a perception among Canadian importers and respondents to AD actions that Canadian investigators are determined to find dumping whether or not it exists. There is also a perception that the AD/CVD Division treats Canadian industry as clients, and that they perceive the objective of the SIMA to be protection of the Canadian industry.[6]

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[2] See U.S. Department of Commerce Office of Inspector General (OIG) Import Administration's Investigation of Steel Industry's Petitions Report No. TTD-5541-4-0001, December 1993.

[3] In our experience, the Department has become more thorough and more (but not fully) transparent.

[4] Respondents are frequently concerned about the protection of confidential information. In our experience, this has not been a problem. While Revenue Canada has the ability to do so, it refuses to provide confidential information to counsel for petitioners except under a protective order which is rarely, if ever, granted.

[5] During the steel investigations, it was noted that:

* IA's analysts lack sufficient product knowledge and spend too much on-site time reviewing background information. (OIG Report, ii.)

* IA staff "did not have the business background or technical expertise to perform the in-depth work necessary to address all the key issues". (OIG Report, iii.)

[6] The basic purpose of SIMA is to provide protection to Canadian industry from injurious dumped imports. It is not designed to provide protection when there is no dumping or where such dumping as may be found is not demonstrably causing material injury.

12. When Canadian exporters are respondents in actions filed in the United States, their view of Commerce investigators is quite similar to those foreigners have of Revenue Canada. This is to be expected. Responsible businesspersons do not appreciate being publicly accused of unfair trade practices nor of injuring their competitors. They will be determined to demonstrate that they have not engaged in unfair practices, often arguing they have done nothing different in the export market than they have done in their home market. Unfortunately, the international rules as applied by the principal users of anti-dumping laws do not permit foreigners to engage in activities such as price alignment and freight equalization, which are a normal part of domestic competition, if it can be established that such practices cause or threaten material injury to producers of like goods in the importing country.[7]

**Department of Commerce - Import Administration**

13. Until 1954 the United States Department of the Treasury was responsible for both calculation of dumping margins and for injury determination. Treasury was perceived by some U.S. industries and by Congress as being soft on foreigners. In 1954, the responsibility for inquiring into injury was moved to the Tariff Commission, now the U.S. International Trade Commission ("Commission").[8]

14. The Trade Agreements Act of 1979 delegated authority to investigate dumping to an administering authority.[9] This role was assigned to the International Trade Administration in the U.S. Department of Commerce.

15. The Import Administration (IA) is one of four separate operating units headed by an assistant secretary within the Commerce Department's International Trade Administration (ITA). IA plays an integral role in ITA's overall mission of carrying out the non-agricultural foreign trade activities of the United States. It has roughly 300 employees in eleven units which implement a variety of laws, administrative regulations, and bilateral trade agreements related to U.S. imports.

16. The primary responsibility of IA is to administer the antidumping (AD) and countervailing (CVD) laws.

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[7] One might reasonably argue that if such practices do not result in price undercutting, the GATT pre-condition for a finding of material injury, they should not be actionable. However, in *cold-rolled steel* (NQ-92-009) and *corrosion-resistant ste*el (NQ-93-007), the Tribunal rejected the price-matching defence and indicated that while imports could follow prices down, they could not do so to the point where they had crossed the line into injurious dumping. We note that this interpretation, with some exceptions, goes back to *soda ash* (ADT-7-83).

[8] The Commission has seldom been labelled soft on foreigners (the recent flat-rolled steel cases were a notable exception) and they are independent. Their decisions (negative injury) have in a number of instances caused Congress to modify law or provide very specific instructions about procedure, or how to establish injury.

[9] U.S. Trade Agreements Act of 1979 § 771 (Pub. Law 98-573 98 Stat 2948).

17. Under the antidumping law, IA investigates allegations that foreign companies are unfairly pricing (or dumping) their exports in the United States.

18. The Office of Investigations is responsible for conducting initial investigations. In addition, three other units in IA play an important role during the investigative phase of the AD/CVD process: the Office of Policy formulates policies which govern the administration of the AD/CVD laws and ensures their consistency with administrative precedent, establishes procedures, and international agreements; the Chief Counsel for IA provides comprehensive legal support and advice; and the IA Office of Accounting and the computer staff work closely with case analysts in the actual calculation of dumping and subsidy margins.

19. When the Office of Investigations completes an investigation, the case is carried on in an "administrative review" process. Each year, one or several interested parties (either on the side of the affected U.S. industry which brought the original AD/CVD petition or on the side of a foreign company or companies whose exports are subject to AD/CVD duties) may request IA to conduct an administrative review of the AD/CVD order. In response, the Office of Compliance will examine the most recent period following the original investigation or last administrative review period to determine whether the extent of dumping or subsidization has changed.

20. The Office of Compliance also conducts administrative reviews of suspension agreements. A suspension agreement is between the U.S. Government and a foreign government/exporters where the latter agrees either to cease exporting the product or to eliminate the unfair subsidization/dumping or its injurious effect. Such an agreement suspends any outstanding dumping or subsidization cases on the relevant product, and duties are not imposed.

21. The Commerce investigation staff is multidisciplinary. Verification teams at Commerce are likely to include investigators trained in law and accounting. It is clear from internal performance audits of the Import Administration that the standards set for IA staff are very high.[10]

**Injury Determination**

**Canadian International Trade Tribunal (Tribunal)**

22. The Special Import Measures Act (SIMA) provides protection to Canadian manufacturers and producers if it is established, to the satisfaction of the Tribunal, that dumped or subsidized imports have caused or threatened to cause material injury to the Canadian production of like goods. The injury test is required because non-injurious dumped or subsidized imports usually benefit consumers through lower prices. Such practices need not be discouraged, if they are not injurious. If material injury caused by dumped imports is established, anti-dumping duties may be levied on these imports to offset the price advantage caused by the dumping.[11]

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[10] OIG Report.

[11] While we say *may* be levied, the imposition of AD and CVD are required in full unless the Minister of Finance on a report from the Tribunal decides that their application be suspended in whole or in part. See SIMA s. 45 and Customs Tariff (CT) s. 101.

23. The Tribunal is an independent administrative tribunal that has been granted the powers of a court of record.[12] The Tribunal conducts several types of proceedings in a quasi-judicial fashion. In arriving at its decisions, it receives submissions, hears evidence and holds public hearings to test the evidence in the record. The Tribunal consists of nine regular members who are appointed by Cabinet (Order in Council) on a "good behaviour" basis. Temporary members may be added should the need arise. It is supported by an administrative secretariat, a research unit that conducts economic studies, and a legal services division that provides legal services and advice.

24. The Tribunal is located in Ottawa. Although its public hearings normally are held in Ottawa, they may be held anywhere in Canada.

25. The responsibilities of the Tribunal go beyond the determination of injury in AD/CVD inquiries. It also conducts the following types of proceedings:

**SIMA Activities**

1) **Reference** - When the Deputy Minister of National Revenue decides not to proceed with a dumping or subsidizing investigation because the evidence does not disclose to his satisfaction that material injury or retardation has occurred or is still occurring, the Deputy Minister or the complainant may ask the Tribunal for a second opinion. The Tribunal then decides whether or not there is sufficient indication of injury to cause an investigation to be continued. If a formal investigation is launched by the Deputy Minister, the exporter, importer or government of the country of export may, in an attempt to terminate the investigation, ask the Tribunal whether the information before the Deputy Minister at initiation reflected a reasonable indication of injury.

2) **Injury Inquiry** - this is an economic inquiry pursuant to Section 42 of the SIMA involving the examination of a wide variety of factors and the formulation of a judgement by the Tribunal as to whether the importation of dumped or subsidized goods is materially injurious to Canadian producers of like goods.

3) **Public Interest** - Under SIMA s. 45, if the Tribunal is of the opinion that the imposition of an AD or CV duty would not or might not be in the public interest, the Tribunal shall report to the Minister of Finance that it is of that opinion, as part of its injury inquiry.[13]

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[12] The Canadian International Trade Tribunal (Tribunal) is the third Canadian body to be charged with making injury determination in anti-dumping inquiries. The predecessors were the Anti-Dumping Tribunal (ADT) [1969-1984] and the Canadian Import Tribunal [1984-1988]. These bodies will all be referred to as the Tribunal for the remainder of this report.

[13] Such a hearing was held on *grain corn from the USA* (PI-1-87). In that case, the Tribunal recommended a major reduction in the countervailing duty. The Minister of Finance, who is not bound to accept the Tribunal's recommendation, modified it, but the applicable duty was reduced by more than half. The CITT also recommended an adjustment in the duty in *beer from the USA* (NQ-91-002) but the Minister did not accept this recommendation. The finding has since been rescinded and appealed to the binational panel which affirmed

4) **Review** - The Tribunal, on its own initiative or at the request of the Deputy Minister of National Revenue or any person or government, may review affirmative injury findings and may rehear any matter in this process.

5) **Importer Rulings** - The Tribunal may be asked to rule on the question of which of two or more persons is the importer of goods on which duty is payable. The Tribunal may reconsider any finding it has made when its ruling as to who is the importer identifies a person, other than the one specified by the Deputy Minister of National Revenue or being the importer.

**Other Activities**

6) Taxpayer appeals of Revenue Canada's customs and excise decisions.

7) Taxpayer appeals under NAFTA amendments to the Customs Act involving:

* rules of origin determinations
* making determinations
* advance rulings with respect to entitlement to preferential treatment under NAFTA.

8) **Governor-in-Council Inquiry** - The Tribunal is asked to inquire into and report on matters referred to it by the Governor in Council pursuant to The Canadian International Trade Tribunal Act s. 18. These inquiries are generally more extensive and far-reaching than injury inquiries and may relate to both goods and services.

9) **Safeguards** inquiries under of the CITT Act s. 20 to s. 30.

10) Responses to bid challenges through the Procurement Review Board for certain goods and services covered by the relevant provisions of NAFTA.[14]

**United States International Trade Commission (Commission)**

26. The United States International Trade Commission is a quasi-judicial, independent, and bipartisan agency established by Congress with broad investigative powers on matters of trade. In its adjudicating role, the Commission makes determinations of injury or threat of injury to U.S. industries by imports. As the Government's think tank on trade, the Commission is a national resource that conducts research on trade-related issues and gathers and analyzes trade data. That

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the rescission (RR-94-001). The only other public interest review, hearing (PB-95-002) *refined sugar* concluded that a public interest recommendation was not warranted.

[14] For more detail, see CITT Annual Report 1994-95, 5-11.

information is provided to the President and Congress as part of the information on which U.S. trade policy is based.[15]

27. Commission activities include:

- Making recommendations to the President regarding relief for industries seriously injured by increasing imports;
- Determining whether U.S. industries are materially injured by imports that benefit from pricing below fair value or from subsidization;
- Directing actions, subject to Presidential disapproval, against unfair trade practices such as patent infringement;
- Advising the President whether agricultural imports interfere with price-support programs of the U.S. Department of Agriculture;
- Conducting studies on trade and tariff issues and monitoring import levels; and
- Participating in the development of uniform statistical data on imports, exports and domestic production, and in the establishment of an international harmonization commodity code.[16]

28. The Commission has had responsibility for the injury test in anti-dumping cases since 1954. Because the injury determination is inherently subjective and subject to political pressures, Congress felt this task should be assigned to a nonpolitical body. Until 1979, the Commission conducted injury investigations with no direction from the Congress and with little judicial review.

29. The Commission's original role was similar to that of the Canadian Tariff Board, which has since been amalgamated with the Canadian Import Tribunal and the Textile and Clothing Board into the Canadian International Trade Tribunal. The Commission was established by Congress in 1916 to de-politicize tariff policy by trying to bring a balance between producer and consumer interests into its analysis and recommendations.[17] Beginning with the Trade Agreements Act of 1979, the Commission has received detailed statutory guidance.

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[15] My understanding of the Commission's operations is derived in part from a meeting with Commissioners Watson and Nuzum and a presentation to Binational Panelists in Ottawa in 1989 by former Commission General Counsel Michael Stein. This section also relies on notes from Mr. Stein's presentation.

[16] USITC Annual Report 1991, 4.

[17] The Canadian Tariff Board did this through its References, supplementing analytical work that has traditionally been done by the expert economic analysts of the Tariff Division, Department of Finance.

30. The Commission has no regulatory functions. It investigates, analyzes the information gathered in its investigations and provides advice. In an attempt to provide a balance to insulate the Commission from political pressures, Congress has provided:

- staggered nine-year nonrenewable terms for Commissioners, so that the hope of reappointment will not affect their judgment;

- six Commissioners, no more than three of whom may be of the same political party, to guard against partisanship;

- submission of the Commission budget directly to Congress, rather than through the President's Office of Management and Budget, as required for every other federal agency, to prevent Executive Branch control of the Commission through the budget process;

- strict limits on the President's choice of chairman. The chairmanship rotates every two years, the new chairman may not be of the same political party as the outgoing chairman and the President may not choose either of the two most recently appointed Commissioners to act as chairman;

- the weakest chairmanship of any federal agency. All decisions of the chairman are subject to being overturned by a majority vote of Commissioners in office;

- extra protection for senior Commission staff. In addition to the usual gamut of civil service protections, their employment may be terminated only if a majority of the Commissioners in office concur.

31. Former Commission General Counsel Michael Stein told a seminar of Canadian CUSTA dispute settlement roster members that:

> "The notion is of a group of six wise men, insulated from the political passions of the moment, who are given extraordinary freedom to advise and adjudicate but not to make policy".[18]

32. Whatever safeguards have been built into the system, it is the perception of accused dumpers (respondents) that both the Canadian and U.S. systems are highly politicized. Given the object and purpose of the laws they oversee and the frequency of affirmative injury findings, these perceptions, whether right or wrong, are understandable.

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[18] While Mr. Stein has acted for U.S. petitioners in cases involving Canada, he has also represented Canadian magnesium interests before the Commission. He had extensive experience as a senior member of the Commission Staff. His is one view. Counsel in the USA who specialize in representing respondents might have a different view of the Commission's objectivity.

## VI. PUBLIC INTEREST AND EXCLUSIONS FROM LEGISLATION

1. The drafters of the GATT AD Codes as well as the WTO ADA recognized that it may not always be appropriate to impose antidumping duties or to impose them in full. In some cases, imposition of high AD duties might have an adverse impact on competition within the importing country or might otherwise be in conflict with the public interest. In this connection, because dumping is only to be condemned if it is injurious, the essential purpose of antidumping duties is to eliminate injury caused by dumping. Any collection of duties over and above the amount necessary to offset injury is superfluous.

2. The WTO ADA does not *require* importing countries to impose antidumping duties nor to impose the full amount of the duties. It states:

> "The decision whether or not to impose an antidumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the antidumping duty to be imposed shall be the full amount of the duty or less, are decisions to be made by the authorities of the importing member. *It is desirable that the imposition be permissive in the territory of all members, and that the duty be less than the margin, if such lesser duty would be adequate to remove injury to the domestic industry"*.[1] (emphasis added)

3. This is known as a lesser duty rule. Some purists and theologians will argue that the application of a lesser duty rule and a public interest rule are different. This view is overly philosophical and too narrow. Whether or not a reduction in the public interest is directly linked to a specific quantity of injury or to some other consideration, the mechanism to achieve the deserved public interest goal will be the waiver of duties, or application in the lesser amount.

4. While the WTO does not *require* that the public interest considerations of duty imposition be examined, some signatories, most notably the European Union, assess the imposition of antidumping duties in the context of the Community interest.[2] So does Canada.[3] Article 6.12 of the WTO ADA states:

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[1] WTO ADA, Article 9.1.

[2] Canada tried to have this concept included in the Uruguay Round text but was not successful.

Ivo Van Bael and Jean-François Bellis, International Trade Law and Practice of the European Communities: EEC Anti-dumping and Other Trade Protection Laws (Bicester: CCH, 1985 [2ed. 1989]), 146.

"A finding of both dumping and injury does not automatically give rise to the imposition of antidumping duties".

(Council Regulation No. 2423/88, Article 11(1) an 12(1))

[3] SIMA s. 45, an infrequently used and in recent years very difficult to satisfy provision. The difficulties encountered in using this provision may be due to lack of adequate

> "The authorities shall provide opportunities for industrial users of the product under investigation and for representatives of consumer organizations where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality".

5. WTO would not and could not require a signatory to impose duties if it was not in the signatory's national interest. Even tariff concessions are cast in maxima or ceilings. Access quotas are minima, which may be exceeded at the discretion of the signatory. *WTO rules, unlike some AD laws, do not require anyone to shoot themselves in the foot.* However, neither Canada nor the USA apply a lesser duty rule.[4]

6. Historically, there have been public interest provisions, of a sort, in the antidumping laws of a number of countries. Some of these have been outright exemptions to achieve specific public policy goals.

7. Noted Canadian economist and early analyst of antidumping systems, Jacob Viner noted that:

- in Britain, consideration must be given to the effect of their (AD duties) application on any British industry using the imported goods as materials for further manufacture;

- the British law did not apply to food and drink;

- the Canadian, Newfoundland and Australian laws authorized the (temporary) exclusion by regulation from the application of antidumping duties of articles of a class or kind not made in the importing countries in substantial quantities *and* offered for sale to all purchasers on equal terms and conditions;

- the Canadian law exempted goods that were subject to tariffs of 50 per cent ad valorem (or more); goods subject to excise tax in Canada, binder twine; sugar imported from Britain; and then sugar from any source when the price in Canada rose above a certain level.[5]

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government guidance.

[4] The Tribunal in *refined sugar* (PB-95-002) noted that Canada does not have a lesser duty rule. This is correct in the sense of a statutory direction. However, a review of the relevant provisions of the Sub-Committee on Import Policy 1981 indicates that the concepts now captured in ADA Article 9.1 were an important consideration in establishing the public interest provision.

[5] Binder twine was an important product to the agricultural community - and it was apparently deemed not to be in the public interest to protect Canadian production through the imposition of additional duties. There have in recent years been two AD findings with respect to binder/baler twine and there were CVD investigations pre-SIMA. We cite these simply as an example of a public interest exclusion from the law.

Even before the introduction of SIMA s. 45, sugar refiners in Canada have tried and failed

**Public Interest Policies**

8. For many years prior to the introduction of SIMA s. 45 in 1984, the public interest issue in a competition policy sense was addressed in *Customs Tariff* (CT) s. 16 (since rescinded). CT s. 16 envisaged reductions in regular customs duty to ensure reasonable competition. We have reproduced this section below to provide an historical perspective:

> (1) Whenever the Governor in Council deems it to be in the public interest to inquire into any conspiracy, combination, agreement or arrangement alleged to exist among manufacturers or dealers in any article of commerce to unduly promote the advantage of the manufacturers or dealers in such article at the expense of the consumers, the Governor in Council may commission or empower any judge of the Supreme Court, or of the Exchequer Court to Canada, or of any superior court or county court in Canada, to hold an inquiry in a summary way and report to the Governor in Council whether such conspiracy, combination, agreement or arrangement exists.

9. The results of the inquiry and consequent action were set out in CT s. 16(3), which states:

> "If the judge reports that such conspiracy, combination, agreement or arrangement exists in respect of such article, the Governor in Council may admit the article free of duty, *or so reduce the duty thereon as to give to the public the benefit of reasonable competition in the article*, if it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of customs imposed on a like article."

10. The focus of this provision is competition and appears very close in intent to SIMA s. 45. It may be necessary in some cases where high AD duties would apply to reduce the duty to a level that will be sufficient to eliminate the injury to give the public the benefit of reasonable competition.

11. The former CT s. 19 (also now repealed) addressed the power of the Governor in Council to remove duties when these resulted in prices higher than should exist. It is clear from testimony before the parliamentary subcommittee by Mr. Lawson Hunter, then Director of Investigations and Research under the *Competition Act*, that former CT s. 19 was a partial predecessor of SIMA s. 45. It stated:

> "In the event of producers of goods taking advantage of any duty imposed under this Act to increase the price of such goods to the consumer, or using any such duty to maintain prices at levels deemed by the Governor in Council *to be higher than should prevail, having regard to general economic*

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(ADT-8-84) to obtain protection from dumping. Persistence appears to have paid off as the Tribunal, while not finding material injury, concluded there might be a threat of injury in NQ-95-002. In PB-95-002, the Tribunal declined to reduce duties described by industrial users as `obscene' ("Sugar ruling sparks bitter response", *Globe and Mail*, April 5, 1996).

Jacob Viner, *Dumping: A Problem in International Trade*, 283.

> *conditions in the country*, the Governor in Council may reduce or remove such duty." (emphasis added)

12. The E.U. antidumping regulation provides that in order for provisional or definitive antidumping duties to be imposed, it must be determined that the interests of the Community call for intervention.

13. Van Bael and Bellis note that:

> "Community institutions have more or less equated the interests of the Community with the interests of Community producers. On a significant number of cases, the issue of Community interests is dealt with by a simple statement that in view of the serious difficulties of the Community industry, it is in the Community interest that action be taken.[6]

14. The E.C. Court of Justice has rejected arguments that inefficient industries should not be protected.[7] There have been similar examples in the Canadian experience.[8]

15. Arguments have been made to the Commission based on *consumer interest, user industry interest, employment in the distribution sector, competition within the Community, and trade relations with other countries*.[9]

16. The Community interest requirement has resulted in some relief from application of the law; however, it has been a minor factor in cases decided to date. Indeed, observers in Europe have noted:

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[6] Van Bael and Bellis, 147. Van Bael and Bellis refer to *paint, distemper, varnish and similar brushes* (China), OJ (1987) L 46/48; *copper sulphate* (Yugoslavia) OJ (1986) L 113/6, and clogs (Sweden) OJ (1980) L 32/2.

[7] *Ibid.*

[8] For example, *porcelain insulators* from Japan and USA (ADT-14-84).

[9] Van Bael and Bellis, citing *video cassette recorders* (Japan, Korea) 071988 L240/15 and *typewriters* (Japan) OJ (1985) L163/9; citing *polyvinyl chloride and resins and compounds* (Czechoslovakia, G.D.R., Hungary, Romania) OJ (1982) L 274/15; *methylamine, dimethylamine and trimethylamine* (G.D.R., Romania) OJ (1982) L 235/35; *natural magnesite* (China) OJ (1982) L 371/21; 148 citing *dot-matrix printers* (Japan) OJ (1988) L 130/32 and *photocopiers* (Japan) OJ (1987) L 54/28.; 149 citing *photocopiers* (Japan) OJ (1987) L 54/29; *ferro-silico-calcium* (Brazil) OJ (1987) L 129/7; *typewriters* (Japan) OJ (1985) L 163/9; and *glycerine* (Japan) OJ (1985) L 176/4; 149-152 citing *urea* (Austria, Hungary, Malaysia, Romania, USA, Venezuela) OJ (1988) L 235/12; *urea* (Czechoslovakia, G.D.R., Kuwait, USSR, Trinidad and Tobago, Yugoslavia) OJ (1987) L 317/10; *deep freezers* (USSR) OJ (1987) L 6/3, Court of Justice Judgement of 5 October 1988 at para. 23 in Technimorg v. Council, Case 77/87; *hydraulic excavators* (Japan) OJ (1985) L 176/4; *Pentaerythritol* (Canada) OJ (1985) L 20/46; and *unwrought nickel* (USSR) OJ (1983) L 159/43.

> ".... It can be said that in many cases, once dumping and injury are found and measures are likely to give relief to the complainant industry, there is a presumption that such measures would be in the Community interests".[10]

17. The E.U. experience has been reviewed in some detail because of their extensive experience as the USA does not have provisions that parallel those of Canada and the E.U. Indeed, there is no way to reduce duties in the USA in the public interest. Canadian and U.S. law and practice are examined below.

## CANADA

18. There has been a view in Canada that trade policies that provide for special measures of protection should be selective in order to avoid imposing unnecessary costs on consumers and on the economy.[11]

19. Protection against import competition imposes costs on some segments of the economy to the benefit of others. Remedying the injurious impact of dumped imports is envisaged by Parliament. But Parliament, in passing the SIMA, has not granted Canadian industry a shield against non-injurious competition. Nor has Parliament created a sword to eliminate non-injurious competitors. Once a non-injurious price level is reached, the "mischief" that the Act is designed to address has been neutralized. Complainants have no recourse under SIMA with respect to non-injurious competition, nor was it ever intended specifically stated by Parliament, that they would be entitled to windfall protection.

20. Application of excessive AD penalties may impose costs on other parts of the economy that are not in the public interest. SIMA s. 45 permits the Tribunal to report to the Minister of Finance recommending reduction or elimination of duties whenever they conclude this is in the public interest.[12] However, the Minister of Finance decides whether or not to act upon the Tribunal's report, which he may accept, reject or modify.

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[10] J. Bourgeous, "*E.C. Antidumping enforcement - selected second generation issues*", (in 1985 Forham Corp. L. Inst.), 563, 589, (cited by Van Bael and Bellis, 150).

[11] That is, protection above the normal rates of tariff protection. This is why Canada has traditionally operated a selective policy towards the quantitative restrictions of textile apparel imports. The USA, and to a significant extent the E.U., has adopted a more comprehensive control approach.

[12] The authority to reduce or eliminate these duties is found in CT s. 101. While SIMA s. 14 has not been invoked, the parallel provision in the Antidumping Act was used in a limited way in the context of ensuring competition and, as noted above, excluding goods subject to a duty under the excise Act that were luxury goods; tobacco, spirits and beer (arguably not a luxury good). It was only with the passage of SIMA removing this exclusion that B.C. brewers could seek and obtain protection from injurious dumping.

21. *Proposals for Import Policy* in 1980, published and circulated for debate, did not contemplate a public interest provision.[13] The issue was, however, discussed in several meetings of the Parliamentary subcommittee that examined the "Proposals". The main discussion occurred during Mr. Lawson Hunter's testimony, which appears in Issue No. 23 of the Minutes of Proceedings.[14] There was further discussion in a subsequent session. The Director's concerns were based on the possibility that excessive protection of industries benefiting from the antidumping duties would remove the benefits of competition. The principal example was the case of hardwood panels, in which Revenue Canada had determined a very high margin of dumping, approximately 70 per cent, which meant imposition of an antidumping duty well over 200 per cent. The concern was that the dumping duties would provide excessive protection.

22. The Subcommittee addressed the public interest question in its report as follows:

> "The primary purpose of Canada's antidumping and countervailing legislation is to protect domestic producers from the injury caused by unfair import practices. In the opinion of some experts, this should be its only purpose. However, some witnesses made strong representations to the Sub-Committee that the concentration on producer interests alone is too narrow a focus and the consumer interest must be considered.
>
> These witnesses stressed that the strict calculation of the dumping margin, resulting in an unduly high import price, eliminates needed competition from a Canadian market dominated by only one or two producers. In this case, a less than full margin of dumping could be levied in order to reflect consumer interest and to promote competition in Canada."[15]

23. A representative of B.C. Hydro (Mr. Robert Bonner) also appeared before the Subcommittee, arguing against the imposition of higher energy costs on B.C. residents to protect Eastern industry - which was represented by the Electrical Equipment Manufacturers Association of Canada (EEMAC). This brought to the fore the historical differences over trade policy between Eastern and Western Canadian interests. The message was apparently sympathetically received by the Subcommittee.[16]

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[13] This discussion document was the basis for public consultation prior to Parliamentary debate on SIMA.

[14] November 9, 1981.

[15] *Report of the Sub-Committee on Import Policy of the Standing Committee on Finance, Trade and Economic Affairs*, on The Special Import Measures Act, (June 1982), 27.

[16] Perhaps this was best expressed in the famous remark by Alberta M.P. "Red" Michael Clark: "The only way to settle the tariff right is to cut its head off just in front of its tail". House of Commons Debates. John Deutsch briefly summarized Canadian tariff policy, under the Liberal party administration of Mr. Saint-Laurent, as: "Protection if necessary but not necessarily protection" in speaking to Rodney Grey when he was about to join the Department of Finance. (Communication from Rodney Grey.)

24. Canadian law, policy and administration on the public interest is consistent with the WTO. However, critics may point out that the public interest provision is rarely used. There have been only two recommendations: one for reduction of a CVD on *grain corn* and one for an antidumping duty on ***beer*** from the USA.[17] The Tribunal's reasoning in *refined sugar* suggests a reluctance or unwillingness to use the provision even when adverse impacts are anticipated.

25. The Tribunal concluded that the duty on *grain corn* should be reduced significantly to the average level of benefits that the Tribunal thought Canadian corn producers would realize (given competition with alternate feed grains such as barley). The Tribunal concluded that the full imposition of the countervailing duty was largely superfluous. Beyond a certain level, the duty provided little relief from injury to the Canadian corn producers, while at the same time creating a major irritant to corn users. It also concluded that there is a level of duty below the full amount that maximized the net benefits to Canadians including both producers and users.

26. The corn producers made submissions to the Minister of Finance that the reduced level of the CVD should not be based on averages and should be limited only by their best expectations - which they admitted was slightly more than half of the subsidy determined by Revenue Canada. The Minister of Finance split the difference between the Tribunal and producer positions and for a substantial portion of the period the maximum duty was in place. The corn producers benefitted from the full amount of the reduced duty on an annual production base of over 100 million bushels, meaning each penny per bushel of the duty was worth $1 million to Canadian farmers. In periods when full benefits were achieved, the difference between the Tribunal recommendation and the final adjustment was worth in excess of $15 million annually to corn producers.

27. In the *beer* case, the Tribunal recommended reduction of duties to the level required to eliminate injury.[18] This recommendation was referred back to the Tribunal by the Minister of Finance for further analysis and hearings, which never occurred. The issue is moot as the finding in *beer* has been rescinded.

28. The Tribunal's analysis and reasons in *refined sugar* suggest that further direction is required from Cabinet on what constitutes the public interest and the extent to which protection in excess of that required to eliminate injury is in Canada's interest.[19]

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[17] There have been infrequent requests for relief. The Director of Investigation and Research, under the Competition Act, has not intervened in the SIMA process on a regular basis. A very notable example of a product where his intervention might have been expected, but did not occur, was CITT *ladies footwear* (NQ-90-003). There may be a number of reasons - many of them budgetary - and a reluctance to intervene in an inquiry involving a very weak industry where the "thin skull" approach to injury determination ultimately prevailed.

[18] NQ-91-002

[19] PB-95-002.

**USA**

29. There is no parallel public interest provision in the USA. Public interest is referred to in the legislative and regulatory provisions relating to suspension agreements which have been used sparingly in the USA in the early 1990s.[20]

30. During the final weeks of the Uruguay Round, traditional users of the unfair trade laws made strong representations to the Trade Subcommittee of the House Ways and Means Committee about their dissatisfaction with the proposed 1994 Code. This led Congressional pressure on USTR not to try to fix what they didn't believe to be broken.

31. The view appears to be that U.S. citizen's access to protection against unfair trade laws should not be guided by political expediency or subject to diplomatic pressures.[21] The suspension/termination of U.S. AD/CVD findings on steel during the VRA period was done only with the concurrence of the U.S. steel industry. Indeed, even trade under the auto pact is not exempt from the provisions of the AD/CVD laws in the USA (nor in Canada).[22]

32. There was an effort to include a *mandatory* public interest requirement in the WTO ADA - an effort that Canada strongly supported. It did not survive except in Article 6.12, which was discussed earlier. Without such a mandatory requirement, there is no immediate prospect that the U.S. will introduce parallel provisions to SIMA s. 45. U.S. commentators have suggested that current Tribunal practice makes SIMA s. 45 little more than window dressing or a debating point.

33. Canadian public interest provisions are potentially more liberal because the USA does not have a parallel provision and does not appear inclined to develop one.[23] However, only one

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[20] Commerce decisions in 1992/93 with respect to uranium resulted in a suspension agreement with Russia that links imports of Russian uranium to sales of newly produced U.S. uranium. Leaving aside the inconsistency with GATT Article III and the object, purpose and National Treatment provisions of NAFTA, this approach gave a new and dangerous meaning to national/public interest in the context of antidumping laws. On March 18, 1994 the Honourable Roy MacLaren wrote to Ambassador Michael Kantor requesting consultations under Chapter 20 of NAFTA about this matter.

[21] This many influence decisions in different ways at different times. Canadian business shares this concern about diplomatic pressures - and their concerns resulted in bringing countervailing duty rules out from the arena of Ministerial discretion into the SIMA where they parallel the rules and procedures for antidumping.

[22] The Automotive Products Chapter of the Tariff Act of 1930 was amended. 19 U.S.C.A. § 2001-2003 provides in § 2003 that nothing contained in this chapter shall be construed to affect or modify the provisions of subtitle B of the title VII of the Tariff Act of 1930 or any of the anti-trust laws as designated in § 12 of title 15.

[23] While WTO ADA Article 9.1 (lesser duty rule) is not mandatory Article 6.12 has been received better. The USTR proposals to Congress do not include any legislative changes to implement Article 9.1. The full imposition of antidumping duties will continue to be the rule in the USA and in Canada, exceptions to that rule will not be infrequent. However, the U.S. did amend their legislation to reflect Article 6.12.

countervailing duty - *grain corn* (PI-1-87) has been reduced under SIMA s. 45. The public interest recommendations in *beer* (RR-94-001) were not implemented. There have been several examples of undertakings made at prices which eliminate injury but not dumping.[24] It cannot be argued that these undertakings dilute the protection intended by the SIMA because:

i) Canadian producers have full consultation with Revenue Canada about what they deem to be non-injurious price levels;

ii) there is a 30-day reflection period in which the industry may withdraw their support for the undertaking.[25] If this happens, the Deputy Minister must terminate the undertaking and issue a P.D.;[26] and

iii) undertakings to remove injury are subject to sunset reviews similar to those applied to Tribunal findings under SIMA s. 76(5).[27] These are reviews by the Deputy Minister which do not provide the same procedure as the Tribunal.

### *De Minimis* Exclusions

34. There are also general rules, not related to the public interest, to exclude from duties imports which are dumped by very low or *de minimis* margins or which are traded in negligible volumes.

35. The WTO ADA has introduced formal *de minimis* and negligibility provisions. The WTO ADA provides that an investigation must be terminated immediately if dumping is *de minimis* or the volume of imports is negligible.[28] *De minimis* dumping is less than 2 per cent expressed as a percentage of the export price.[29] A negligible volume is less than 3 per cent of total imports from an individual country and 7 per cent of imports in total from all negligible country suppliers.[30]

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[24] Before the WTO ADA Such undertakings could only be concluded prior to the preliminary determination of dumping. However, in each case the Revenue Canada notice indicated the estimated dumping margin and confirmed that the undertaking prices did not more than offset dumping. Examples include, oil country tubular goods, (OCTG) casings from Japan and porcelain insulators from Japan.

[25] SIMA s. 51(1).

[26] *Ibid.*, s. 51(2).

[27] Article 11.5 of the WTO ADA requires that the sunset provisions be extended to undertakings. This would provide a judgement by the judiciary rather than the constabulary on the need to continue an undertaking or to rescind or allow it to expire. However, SIMA has not been amended to require a Tribunal review and the constabulary (Revenue Canada) still controls the process.

[28] Article 5.8.

[29] *Ibid.*

[30] *Ibid.*

36. Canada and the USA have implemented Article 5.8 faithfully for investigations. The new negligibility standard is credited for Korea being excluded from a U.S. investigation of dumping of polyvinyl alcohol.[31] However, the U.S. does not apply the 2 per cent *de minimis* rule for reviews. Revenue Canada did not apply the *de minimis* exclusion in *refined sugar* (NQ-95-002), concluding that exclusion from the investigation would increase imports from the negligible countries above the negligibility threshold. The Tribunal in *refined sugar* excluded Korea on negligibility grounds, but considered imports from the entire E.U. declining to limit their consideration to the named member states which meet the WTO criteria.

37. There is an historical basis for *de minimis* exclusions. Viner pointed out that:

> "The Canadian law authorizes the customs authorities to exempt from the antidumping duty foreign goods sold for export at a price which is not lower than the foreign market value by more than a small percentage (not more than 5 per cent of the foreign market value) and an identical provision is contained in the Newfoundland law.[32]

38. Australia had a similar exemption in the 5-10 per cent range, and Britain imposed no antidumping duties of less than 5 per cent. The U.S. 1916 law was only designed to address imports priced at "substantially less than" the foreign market value.[33]

**General Exceptions**

39. Traditionally, the Governor-in-Council has had the discretion to exempt, in whole or in part, any Canadian products from the application of SIMA.[34] This is consistent with the view of the

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[31] David Palmeter, Report to UNCTAD, 2-3.

[32] Jacob Viner, *Dumping: A Problem in International Trade*, 278.

[33] *Ibid.*, 278-279. Viner cited administrative expediency as a benefit of these *de minimis* exclusions and also noted:

> "There is no reason, however, why the ability of a buyer to make his purchases, whether in the domestic or in the foreign market, at a shade under the prices paid by most buyers should if exercised in his foreign purchases make him subject to the dumping penalty. The allowance of a small margin of difference between the current foreign market value and the export price before the dumping-duty becomes applicable permits the importer to utilize his buying skill within limits without losing all advantage there-from through making himself liable to additional duty".

*Ibid.*, 279.

[34] SIMA s. 14 envisages that the Governor in Council may, on recommendation of the Minister of Finance, exempt any goods or class of goods from the application of the Act. Duty remissions or reductions are granted where appropriate under CT s. 101.

Government of Canada, that the transfer of resources to specific interest groups, whether through tariff protection or otherwise, *is a privilege, granted by Parliament, not a right* (emphasis added).

40. There was a provision in the Antidumping Act s. 7 which excluded from the application of the Act, goods that were designated by the Governor-in-Council and any goods that were subject to the imposition of a duty under the Excise Act. That exclusion of goods subject to the Excise Act had its origins in the antidumping legislation introduced by Finance Minister Fielding in 1904.[35]

[35] Sir William Fielding, Budget Speech, 4331-4406.

## VII. INITIATION/ASSESSING THE COMPLAINT

1. There have been concerns expressed that it is too easy to initiate investigations. Commerce prior to the URAA did not take positive measures to confirm support for a petition. The WTO ADA strengthens the requirements for determining support for a complaint and clarifies petition requirements.[1]

### General Requirements

### WTO

1. Article 5.1 of the WTO ADA requires that:

> "Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the domestic industry".[2]

2. The Agreement envisages that a complaint (application) should include evidence of:

- dumping;
- material injury;
- a causal link between the dumped imports and the alleged injury.[3]

3. The ADA requires that a complaint be filed by or on behalf of an industry in the importing country producing like goods.[4] In the past, different interpretations of this provision have resulted in several dispute settlement actions to determine who has standing to bring a complaint.[5] The WTO

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[1] WTO ADA Article 5.1.

[2] Article 5, paragraph 6 envisages self-initiation by the investigating authorities.

[3] WTO ADA Article 5.1.

[4] WTO ADA Article 4 defines *domestic industry* as referring to the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

[5] The U.S. lost two GATT dispute settlement panels to Norway (*salmon*) and to Sweden (*stainless steel hollows*) because they assumed support for a petition rather than taking positive steps to confirm it.

In GATT Dispute Settlement of the U.S. CVD/AD investigation of imports of *fresh and chilled salmon from Norway* (CITT Publication 2371, 1991), the GATT Secretariat reported:

> "Specifically, Norway complained *inter alia* that in both cases the United States had failed to satisfy itself that the request for investigations had been filed on behalf of the domestic industry."

ADA clarifies and improve the rules about determining support for a complaint.[6] Now there must be positive evidence of support in order to confirm that petitioners have standing to bring the complaint.

4. WTO ADA Article 5.4 does not require changes in Revenue Canada practice, but has been reflected in SIMA. Revenue Canada, in our experience, will take steps to assess support or opposition to an investigation, but there is no polling requirement in Canadian antidumping regulations. The SIMA Handbook contemplates polling (where there is insufficient support) but does not require it.[7]

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The USA objected to what it described as the specificity and the retroactive character of the remedy proposed in Salmon from Norway in contrast with the general recommendation usually provided by panels. They argued that the GATT Panel had overstepped its authority in remanding the decision and recommending refunds. As a result, the Panel's Report remained unadopted and may not be used as a precedent. (*GATT Activities*, (1991, Geneva, Switzerland), 62.)

Further, the Panel, in *stainless hollow products from Sweden*, found:

> "that the United States had acted inconsistently with the provisions of the Anti-Dumping Code in initiating an antidumping investigation without satisfying that the request for the initiation of the investigation was filed on behalf of the relevant domestic industry. The Panel recommended that the United States revoke the antidumping duties in question and reimburse the antidumping duties paid."

6 WTO ADA Article 5.4 which requires that no investigation may be initiated unless the investigating authorities determine that it is supported by domestic producers whose collective output constitutes 50 per cent of total production of that portion of the domestic industry expressing either support for or opposition to the application. However, initiation is further prohibited unless producers expressing support for the application account for more than 25 per cent of the total production of the like product produced by the domestic industry.

7 "If a sufficient proportion of the Canadian industry does not support the complaint, it may become necessary to contact other Canadian producers in order to try to obtain their support. The complainant has the option of contacting these companies directly or having the investigating officer contact them. However, in order to contact them, the officer may have to reveal that a complaint has been filed with the Department. The complainant should be made aware of this possible outcome and be prepared to deal with any possible repercussions..."

"If a company or companies send the Department correspondence objecting to the initiation of an investigation, this fact should be addressed in the initiation Statement of Reasons."

**CANADA**

5. In Canada, complaints are filed in writing with the Deputy Minister (D.M.) of Revenue Canada. The complaint must contain evidence of dumping and material injury and of the causal link between the alleged dumping and the claimed injury.[8] The complaint must also be filed by producers representing a major portion of domestic production, or if submitted by less than the requisite portion of the industry must be expressly supported by other producers.

6. The WTO ADA has been revised to make the rules about standing more specific. It requires that:

- administering authorities poll the industry to determine support for a complaint;
- 50% of respondents to polling support a complaint as a pre-condition for initiation; and
- in no case can an investigation be initiated without the support of producers accounting for at least 25% of production of subject goods.[9]

7. The WTO ADA recognizes the need for change in U.S. practice with respect to determining standing. While U.S. users of the system did not want to see new rules in this area, USTR advised Congress that it will be necessary to amend 19 U.S.C.A. § 1673a(c) and 1671a(b) to specify procedural requirements for determining pre-initiation industry support.[10] The amended U.S. law contemplates polling to determine support.

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[8] Sufficient evidence on all three issues must be provided in to Revenue Canada in order for the complaint to be considered properly documented and a candidate for initiation of an investigation.

Revenue Canada receives and reviews dumping, injury and causality evidence provided by complainants and determine its adequacy. They also cross verify claims about export prices through their access to computerized information on import transactions. SIMA s. 31(1).

[9] 1994 AD Code Article 5.4.

[10] The Committee on Pipe and Tubes argued in an appearance before the House Ways and Means Committee argued that to require polling in every case prior to initiation would substantially increase the burden on Commerce during the 20 days during which it must evaluate the petition. In their view, it would also unfairly shift the burden to petitioners and Commerce to prove standing even in the absence of any public opposition to the petition from the domestic industry. It was also claimed that mandatory polling would act as a barrier to filing petitions by forcing domestic producers to express an opinion as to the petition when it may be in their economic interest to have the case to go forward without expressing such an opinion. For example, it was explained that many companies have technical or licensing agreements, joint ventures or investment relationships with foreign competitors against whom they may also wish to see cases filed. The Committee claimed it is common in such cases for companies to support petitions by providing information or financial assistance, but to express no opinion on the record regarding the petition where doing so may jeopardize its relationship with a foreign entity. *(Statement*

8. Before initiating an investigation, Revenue Canada requires positive evidence of support in line with the requirements of WTO ADA Article 5.4. Canada did not need to amend the SIMA to reflect the more detailed provisions of Article 5.4. Revenue Canada's criteria for confirming standing requires active support by a major portion of the industry at the time of the initiation of an investigation by Revenue Canada. This is also done to ensure the Tribunal has evidence of injury to a major portion of Canadian production of like goods.

9. Revenue Canada has prepared detailed questionnaires to assist complainants in compiling the information necessary to develop a properly documented complaint. In recent years, the requirements have been simplified in order to address concerns that Revenue Canada was seeking too much information, thus discouraging use of the antidumping defence.[11] The new questionnaire focusses more directly and in a more limited way on the basic information required under SIMA and the WTO ADA. Nor is it necessary to follow a fixed format as long as the required information is provided.

**USA**

10. In the USA, an antidumping investigation is normally initiated by the filing of a petition with both the Department of Commerce (Commerce) and the United States International Trade Commission (Commission) by an "interested party" on behalf of a domestic industry.[12] Prior to the WTO implementing amendments, standing in the United States could be gained by default and through industry apathy.[13] The petitioner did not have to establish that the industry supports the petition. And Commerce did not poll other producers to determine whether in fact they supported the complaint.

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*to the House Ways and Means Committee by James Feeney, Wheatland Tube Company, November 5, 1993.*) *Inside U.S. Trade*, Special Report, March 11, 1994, 3.

[11] It was argued that the complaint should contain only enough evidence to justify initiation - it should not require the same degree of proof that might be required for the definitive injury determination by the Tribunal. This seems to be in line with Revenue Canada practice in my experience. However, if the complaint is shaky, Revenue Canada will probe further. This is important because Canada does not have the same type of adversarial preliminary injury investigation which is conducted in the USA.

[12] This petition must contain evidence required by Article 5.1 of the AD Code. For this purpose, the term "interested party" means a manufacturer, producer or wholesaler in the United States of a like product, a union or group of workers representative of an industry engaged in the manufacture, production or wholesale in the United States of a like product, or a trade or business association, a majority of whose members manufacture, produce or wholesale a like product in the United States. A trade association representing agricultural producers or producers may also have standing unless USTR advises that this is inconsistent with the international obligations of the USA. (19 U.S.C.A. § 1677(9))

[13] 19 U.S.C.A. § 1673a(c)4D. In *magnesium from Canada* (USITC Publication 2550, 1992), the complaint was brought by a firm accounting for 23 per cent of U.S. production.

11. The U.S. General Accounting Office (GAO) Comparative Report noted the following regarding issue of standing:

> "The Antidumping Code does not explicitly require `standing' to file a complaint and initiate an investigation. Instead, the Code stipulates that the request to initiate antidumping investigations must be made by or `on behalf of the industry affected'."[14]

12. The GAO Comparative Report also stated the following in respect of pre-WTO ADA Commerce practice:

> "The United States ... assumes that standing exists for any petition filed unless a majority of the industry shows opposition. A U.S. Commerce official explained that when the remainder of the industry (aside from the direct petitioner) has knowledge of the petition and does not oppose it, the petition is considered satisfactory and in compliance with the requirements of GATT. Petitioners usually provide information to show what proportion of the industry they represent, and Commerce will generally accept the data represented. Also, Commerce has not established any formal or informal standards for what constitutes a major proportion of the industry."[15]

13. In *3.5" Microdisks* from Japan, respondents argued that the petitioner did not have standing because it had not established industry support and did not qualify as a manufacturer of like products.[16] Commerce rejected this position, noting that their practice was to rely on the petitioner's representation that it had filed on behalf of domestic industry - unless it was affirmatively shown that a majority of the industry opposed the petition. Before the WTO changes, Commerce considers that neither the legislation nor the legislative history restricts access by requiring the complainant to establish affirmatively that a majority of members of a relevant industry support a complaint. In their view "the only requirement is that the party filing the petition act as a representative of the domestic industry".[17]

**Standing for Labour Unions**

14. U.S. negotiators were successful in retaining the right of labour unions to file antidumping petitions. Under U.S. law, labour unions do have standing.

15. U.S. interests have not been alone in their concerns about labour union participation. During the 1968 Canadian Parliamentary hearings on the White Paper, Mr. Hales (MP) discussed "standing"

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[14] GAO Report, 22.

[15] *Ibid.*, 23.

[16] U.S. 54 Fed. Reg., 6435, (February 10, 1989).

[17] *Ibid.*

with Rodney Grey in the context of a (hypothetical) decision by a multi-national company to shift production out of Canada to a plant in another country. Mr. Grey commented that it might be that the union at a plant might argue injury based on lost employment. Mr. Grey thought that it would be within the discretion of the Deputy Minister to determine whether or not an investigation should be initiated.[18]

16. Only producers have standing to file a complaint in Canada.[19] Labour unions would not be in possession and control of the data that would be required to make a case of injury to the Tribunal. They may, however, participate in Tribunal inquiries as an interested party.[20]

**Self-Initiation**

17. Both Revenue Canada and Commerce can initiate an investigation on their own authority without a complaint or petition whenever they determine from information available to them that a formal investigation is warranted.[21] However, as a matter of general policy, both are reluctant to do so. Canada and the USA have both self-initiated antidumping investigations, with Canada appearing to have a greater inclination to self-initiate than the USA. Canada has done so on three occasions.[22] The USA has self-initiated in only one antidumping case, and in one CVD case that has been particularly bothersome to Canada - *softwood lumber*.[23]

18. While Canada has complained about the self-initiation in *softwood lumber* (and had its claims rejected by a GATT Panel), it is noteworthy that the self-initiation provision in the Code was introduced at the insistence of Canada over the objections of the U.K.[24]

**Assistance to Small Petitioners**

19. The principal pressure for self-initiation comes from small petitioners (and at times from some rather large ones who are frequent users of the process) who wish to avoid the cost of preparing and

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18 House of Commons Standing Committee on Finance Trade and Economic Affairs, Minutes of Proceedings and Evidence, No. 3, (October 29, 1968, 34-35).

19 SIMA s. 31(2).

20 CITT Rule.

21 SIMA s. 31(1).

22 Canada has self-initiated on *photo albums* (ADT-4-74), to address "country-hopping"; on *heat-treated carbon steel plate* (NQ-92-007, to remedy a serious deficiency in a complaint on carbon steel plate (other than heat-treated); and in a recent investigation of *carbon steel plate* (NQ-93-004) from new suppliers, following shortly after a partial material injury finding against other suppliers.

23 Softwood Lumber from Canada, USITC Publication No. 2530 (July 1992).

24 Grey Testimony, 50.

documenting a complaint petition. Commerce has been urged by Congress to provide assistance to those who can least afford it and is required by its regulations to:

> "provide technical assistance to eligible small businesses as defined in section 339 of the Act, to enable them to prepare and file petitions.[25]

20. This assistance enables smaller firms to access the system at a lower cost than if they retained counsel to prepare their complaint. It also eliminates the need for Commerce to self-initiate and gives it an opportunity, at an early stage, to assess the quality of the petitions.[26] If the Secretary determines that the petition, if filed, could not satisfy the sufficiency requirements of 19 CFR § 353.13, such assistance may be denied.[27]

21. Revenue Canada too will provide advice and assistance to small firms seeking to use the SIMA remedies, although such help is not required by law. Such assistance would appear to be regarded as a normal function of government by both Canada and the USA, with a statutory mandate in the case of the USA

22. We are not aware of either Commerce or Revenue Canada actively soliciting AD complaints. Canadian trade associations, commenting on Revenue Canada's performance, complained there was insufficient industry awareness of relief available under the antidumping law. Revenue Canada has taken positive steps to enhance industry awareness of their activities.[28]

**Transparency**

23. In Canada, the filing of a complaint is not generally a matter of public knowledge, unless the complainant publicizes the filing.[29] Revenue Canada must first satisfy itself (within 21 days) whether the complaint is properly documented, and after making that designation determine within 30 days whether there exists a *prima facie* case of dumping and material injury and a causal link between the two. This preliminary review by Revenue Canada appears to be more extensive than the pre-initiation review Commerce undertakes. However, since neither agency operates in the sunshine, these differences cannot be demonstrated nor quantified. Contacts with counsel for

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[25] 19 CFR § 353.12(h)(i). The revised post URAA antidumping regulations are not finalized yet. In these cases, I must refer to the earlier version of the regulations as I have done here.

[26] We do not have access to information that would permit us to assess the relative effectiveness of the pre-screening activities of Revenue Canada and Commerce.

[27] 19 CFR § 353.12.

[28] Revenue Canada has undertaken general mailings to trade associations to enhance awareness of the availability of protection under the SIMA.

[29] Revenue Canada defends their position arguing that publicizing filings upsets trade more than maintaining secrecy until initiation and claims consistency with WTO ADA Article 5.5.

petitioners indicate that the cost of pursuing AD actions discourages frivolous complaints. They also suggest that a Commerce review of draft complaints is quite rigorous.

24. WTO ADA Article 5.5 and SIMA s. 32(1)a now require Revenue Canada to provide a copy of the complaint to the government of the exporting country between the time the complaint is properly documented and the investigation is initiated or rejected. Revenue Canada requests that this early disclosure be confidential, without much success.

25. Revenue Canada has, in recent cases, claimed that the right to present evidence envisaged in Article 6.1 of the AD Code does not apply until after the investigation has been initiated. In rare cases, and only after extensive representations to Revenue Canada and other Trade/Economic Departments, has it been possible to have products excluded from the scope of a potential antidumping investigation.[30]

26. Within 20 days of filing a petition, which is a matter of public knowledge, Commerce must decide whether to initiate an investigation, based upon the sufficiency of the petition. During this period, it may check the allegations in the petition against facts in the public domain but it may not receive information from the respondent or the respondent's government.[31] This latter requirement is clearly set out in Commerce's regulations.[32]

27. According to the U.S. General Accounting Office (GAO), a Commerce official stated that some screening of potential petitions takes place even before petitions are filed. He estimated that for every two or three cases that may be brought to Commerce's attention, only one is ultimately filed.[33] Once a case is formally filed, however, the vast majority are accepted by Commerce for investigation.

28. Commerce finds very few petitions to be insufficient at the initiation stage. According to statistics from Commerce, an estimated 144 antidumping petitions were received from 1986 through 1989, and only six cases were dismissed during this four-year period.[34] Another Commerce official

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30 In *corrosion-resistant steel sheet* (NQ-93-007), potential respondents pointed out several months prior to initiation (after the industry publicized its preparation of a complaint) that 88% of imports from the USA and more than 80% of the imports from Japan, by value, had been declared by Revenue Canada to be a class or kind *Not Made-in-Canada* for purposes of tariff classification. The investigation, as initiated, excluded these "auto-exposed" qualities.

31 Roses Inc. v. United States, 706 F.2d 1563 (Fed. Cir. 1983).

32 19 CFR § 353.12(i) (1993).

33 Annex A suggests that Revenue Canada is at least as rigorous. But the Commission relatively frequently dismisses investigations at the preliminary information stage. The Tribunal has only done this once.

34 *Ibid.*, 20.

told GAO that in general, the USA may not go into as much depth as other countries in its review of evidence for initiating an investigation.[35]

29. While Commerce must undertake more extensive activity in order to implement WTO ADA Article 5, some of their requirements are to be included in their regulations which have not been finalized and published at the time of writing. However, the Administration noted in the Statement of Administrative Action that the ADA requirements were consistent with existing Commerce practice and with the Legislative Intent of the Trade Agreements Act of 1979.[36]

**Evidentiary Requirements**

**Evidence of Dumping**

30. While it is not difficult under the current byzantine rules to establish dumping, it is essential to have evidence of dumping in order to initiate an investigation. When addressing the Canadian Parliamentary Standing Committee considering the 1968 White Paper on Antidumping and related legislation, Rodney Grey underlined that:

> "The production of a product abroad and its export to Canada at less than the Canadian price is not necessarily dumping."[37]

31. Mr. Grey went on to note:

> "If it is not dumping it is not dumping. It may be an awkward problem of competition and it may well be that this competition is facilitated by the relationship the subsidiary has to its parent company and the availability to it of a product of more modern design but is not dumping."[38]

32. Complainants must provide evidence of dumping. Revenue Canada reviews these claims very carefully.[39] There is no appeal from Revenue Canada's decision not to initiate an investigation - or

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[35] United States General Accounting Office (GAO), Report to Congressional Requesters, *International Trade: Comparison of U.S. and Foreign Antidumping Practices*, GAO/NSIAD-91-59, (November, 1990), 19.

[36] Message of the President and Statement of Administrative Action House Document 103-316 Vol. 1, (September 27, 1994), 861.

[37] Grey, Testimony to the Commons, 35.

[38] *Ibid.*

[39] The SIMA Handbook (dated September 16, 1994) provides detailed guidance about verifying standing but notes with respect to the existence of dumping:

> "The following are examples of situations which may be included in a complaint to support allegations of dumping. These examples are by no means exhaustive:
>
> a) evidence, perhaps taken from invoices, showing that the

to terminate one - because there is no evidence of dumping. The same is true of the Commerce decision in the USA. Revenue Canada very rarely determines that there is no dumping or negligible dumping once an investigation is launched.[40] Indeed, if a complainant does not provide sufficient *prima facie* evidence of dumping, then Revenue Canada will decline to designate the complaint properly documented. Potential complaints (inquiries) that are not supported by adequate evidence of dumping never become formal complaints. Revenue Canada weeds these out at an early stage. Revenue Canada is quite confident about its abilities to judge dumping. In a 1986 internal assessment of the effectiveness of the Assessment Programs Branch, Revenue Canada noted that during the period reviewed (December 1994 to April 1986), 97% of the investigations that the Department conducted resulted in dumping/subsidization being found at the preliminary determination. Only one investigation was terminated because no dumping was found.[41]

**USA**

33. There are relatively few instances where investigations initiated by Commerce do not result in determination of dumping. Anecdotal evidence, and our own work with petitioners in Canada suggests that Commerce is very assiduous in analyzing complainants' evidence of dumping. It must be recognized that producers have difficulty in obtaining such information since it is generally

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goods are being sold to Canada at less than the market price in the country of export;

b) a comparison of the price to the importer with an estimate of the exporter's total cost of production; and

c) price lists and discount schedule in the exporter's domestic market showing sale prices higher than those in Canada.

If the complainant provides documents to substantiate the above, or if the information and documents submitted by the complainant are sufficient when combined with data obtained by the Department then the requirement to state in reasonable detail the facts on which the allegations of dumping are based will have been met. However, if the information and documents submitted by the complainant is not sufficiently detailed and the Department has not satisfied itself through its own research of the facts that there is dumping, the complaint cannot be considered properly documented."

SIMA Handbook, Section 4.1.4.2 Evidence of Dumping.

[40] See for example *polyester filament fabrics from the USA, spandex yarn from Korea, polyester filament yarn from Mexico* and *12-volt motorcycle batteries from the Republic of Korea*. In OCTG (1986), there was no dumping at F.D. against Austria and the investigation was terminated against Austria. In the cold-rolled steel sheet (1992-93) and corrosion-resistant steel sheet (1993-94) investigations a number of U.S. producers and exporters received zero dumping margins but were not excluded from the continuing investigation and Tribunal inquiry. Nor were they excluded by the Tribunal, and continue to be subject to the finding.

[41] Revenue Canada, Audit and Evaluation Branch, *Evaluation, Study of the Assessment Programs Component* - Detailed Findings (March, 1988), 33.

required from a foreign country. Without price lists from the foreign market, and discount schedule and documentary evidence of export selling price, the process will require some degree of assumption and calculation.

34. Counsel for U.S. petitioners explain that they must have hard evidence of dumping or subsidization, in order to justify the cost/risk/benefits to petitioners of filing the complaint. Commerce often subjects complaints to rigorous review and testing in draft prior to filing. Weak draft complaints are likely to be withdrawn.

35. Revenue Canada and Commerce record of being able to judge the existence of dumping prior to initiation may be due to the fact that it is not difficult to find dumping at least in the technical sense because:

a) exporters who have significant protection or locational advantages in their home market must price to world prices, or market prices in the country of export if they wish to generate adequate volume; and

b) it is often necessary to equalize freight to a competitor's plant, particularly for basic industrial materials. Should the competitors plant be in another country, this will create a technical dumping situation.[42]

**Initiation**

36. During research for preparation of this study, some Canadian industrialists argued that Revenue Canada's initiation standards were higher than those applied by the Department of Commerce and the Commission. Revenue Canada, however, can point to a sound record. An audit and evaluation study determined that in virtually every case, properly documented complaints resulted in the initiation of investigations.[43] Not all of these investigations resulted in definitive injury findings, only 76 per cent did, because the Tribunal has a different, higher threshold injury standard than Revenue Canada.[44]

37. Revenue Canada does not seek input from respondents prior to initiation. There are no adversarial procedures before initiation by Revenue Canada. The system is not transparent. Revenue Canada will neither admit nor deny they have a complaint unless the petitioner publicizes the fact. They also take the position that a draft complaint has no status. Conceivably, one could eventually access the draft complaint in some highly sanitized form through Access to Information. However, these procedures are too time consuming to provide timely access, and in most cases, the draft would have become a definitive complaint, which Revenue Canada will not release except to governments until initiation.[45] The approach taken is to determine whether there is sufficient evidence to initiate an investigation.

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[42] Jeffrey Garten, *Notes for Remarks*, argues that location is a comparative advantage.

[43] Audit and Evaluation, *Study*, p. 28. Of 40 PDCs, 38 led to initiation.

[44] Audit and Evaluation, *Study*, p. 30.

[45] This practice was modified as a result of WTO ADA Article 5.5 which requires that after

38. While Revenue Canada has come under criticism for using only petitioners' information in their analysis, they have been upheld by the Federal Court on two occasions.

39. The Federal Court of Appeal is hesitant to intervene in Revenue Canada's activities when the process itself may resolve the problem. This principle was clearly set out by Strayer, J. in the judgment in an application under Federal Court Act s. 18 in *boneless beef* (Chisholm).[46] Similar issues were raised on behalf of Hyundai.[47]

40. Discussions with Revenue Canada, and thorough analysis of their activities indicates that they receive many more inquiries than they do actual complaints that are eventually declared properly documented and result in investigations (see Annex A). Many inquiries are abandoned before they result in formal complaints.

41. Experience in filing complaints with Revenue Canada indicates that they are quite assiduous about ensuring that complaints are properly documented, as the WTO ADA and SIMA require. There is no graveyard at Revenue Canada littered with the corpses of complaints that should have passed muster and would have resulted in definitive injury findings. While Revenue Canada insists on having supporting information, they also work closely with petitioners to facilitate access to the system. Given the high cost of pursuing AD actions for both petitioners and respondents, Revenue Canada would not be helping petitioners by initiating without solid evidence.[48]

42. There were no statistics comparable to those in Annex A to assess how assiduously Commerce assesses evidence of dumping prior to initiation, however, relatively few petitions are dismissed. In the USA, a negative preliminary determination on the issue of dumping does not result in the termination of an investigation. Commerce does not verify prior to P.D. It is not unusual for final dumping margins in the USA to be higher than preliminary margins. The reverse is often true in Canada, where there is less time to estimate the preliminary margin of dumping and Revenue Canada is more likely to seek additional information to be analyzed before the F.D. than to give the exporter the benefit of any doubt or uncertainty.

43. Termination by Revenue Canada at P.D. does not necessarily mean the end of Tribunal activity. Revenue Canada, in the investigation of alleged dumping and subsidization of *baler twine from Portugal and the USA*, terminated the investigation at a preliminary stage notwithstanding that subject goods of U.S. origin were found to be dumped. They did this because imports from Portugal, which set the price, were neither dumped nor subsidized, and the D.M. had concluded

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receipt of a properly documented application and before proceeding to initiate an investigation, the government of the exporting country(ies) concerned is (are) to be notified.

[46] Docket No. T-2936-85 May 20, 1986 (11 C.E.R. 309 (S.C.T.D.).

[47] See *Hyundai Motor Co. et al. v Attorney General for Canada et al.*, (August 21, 1987), F.C.T.D. Court File #T-1687-87.

[48] Even with Revenue Canada's stringent scrutiny, some 30 per cent of inquiries before the Tribunal have resulted in no injury findings.

there was insufficient evidence of a causal link between the U.S. dumping and injury to production in Canada.[49]

44. In *baler twine*, Revenue Canada concluded it was required to terminate in part because it determined there was no dumping or subsidization from Portugal. The Department could not cumulate the impact of the dumping from the USA with claimed injury from Portugal. However, Revenue Canada also noted that their decision to terminate "should not be viewed as an invitation to dump," and made reference to the possibility that the complainant would renew its request for protection if the situation warranted.[50]

45. The Tribunal, pursuant to a review under SIMA s. 37, found that there was a reasonable indication of material injury from dumped imports from the USA, and Revenue Canada issued a Preliminary Determination. This proceeded to a SIMA s. 42 injury inquiry, which resulted in an affirmative finding of injury.[51]

**Evidence of Injury**

46. The criteria that are examined by both the Canadian and U.S. authorities to determine whether dumping is causing injury are set out in the WTO ADA.[52] These factors are addressed in each

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[49] Revenue Canada Statement of Reasons, (October 27, 1993), 8.

[50] *Ibid.*, 9.

[51] CITT NQ-93-003.

[52] WTO ADA:

> "3.1 A determination of injury for purposes of Article VI of the GATT 1994 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.
>
> 3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
>
> 3.3 Where imports of a product from more than one country are simultaneously subject to antidumping investigations, the investigating authorities may cumulatively assess effects of such imports only if they determine that (1) the margin of dumping established in relation to the

country by the relevant administering authorities. Commerce does not play a meaningful (any) role in the pre-initiation assessment of injury - this is left to the Commission.

47. Revenue Canada must undertake an analysis of the adequacy of evidence about both dumping and injury prior to initiation. The Revenue Canada preliminary injury review is in effect a determination as to whether there is a reasonable indication of material injury from the dumped imports, or whether the complainant has provided enough evidence of injury, or threat of injury to justify an investigation.[53]

48. At this stage of the process, the causality analysis is at best a very low threshold one. In Canada, and at Commerce, the regulations and administrative practice generally preclude useful or contrary input from those opposing the petition.[54]

49. Governments will tend to limit the preliminary inquiry to weeding out complaints that are totally or largely devoid of merit. As long as there is some reasonable indication that the dumping has had adverse impacts on local industry, or could have such impacts if the dumping were to continue, there is a strong likelihood that an investigation will be initiated.

50. The causality analysis undertaken in the Commission's preliminary reviews is also limited and based on a low threshold, but it does exist, as evidenced by the fact that the Commission more frequently issues negative preliminary injury findings than the Tribunal. Some officials and practitioners I consulted argued that the Commission's record should be this way because Commerce does not assess injury prior to the initiation of an investigation, while Revenue Canada does. This said, it can certainly be also said that the Commission's analysis is more thorough and takes account of evidence of all interested parties, as compared with Revenue Canada's initial assessment of injury prior to commencing an investigation, or the Tribunal's advice on referrals which is limited to determining whether information before Revenue Canada reflects a reasonable indication of injury (or threat).

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> imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and that the volume of imports from each country is not negligible and (2) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product.

[53] This analysis in both jurisdictions is a very low threshold test. Under the Antidumping Act, the evidentiary standard was "prima facie". This is still the standard in Canada, dressed up with different words.

[54] As noted above, in some cases where the complainants have publicized their intentions, Revenue Canada will accept and may take account of respondents' submissions but this does not guarantee the Tribunal will attach any weight to them.

Even when there is contrary evidence in the record, the Tribunal analyzes only whether the information filed by the industry contains a reasonable indication of material injury. As they explained in their advice on *corrosion-resistant steel shee*t (where there was extensive evidence from respondents on the record), it is only to determine whether there was sufficient evidence to warrant initiation (*corrosion-resistant steel sheet* (RE-93-001)).

51. The benefits of a somewhat higher threshold (but not very high) level of review done by the Commission than by Revenue Canada should neither be overstated nor trivialized. Canadian and U.S. systems address the important issues of injury and causation in a thorough and assiduous manner. However, a critical as opposed to a theoretical analysis recognizes that:

- Antidumping systems are a safety valve. They reduce pressures on governments for different and more disruptive protective measures;

- If a complainant with sufficient industry support can make a *prima facie* case, it is politically difficult to establish hurdles that are too high for initiation, denying the petitioner a full investigation and their day in court; and

- A proper analysis of the causal relationship between dumping and injury or threat of injury to domestic producers of like goods often requires a more extensive analysis and information than is available during the period immediately after the complaint is filed.

52. In this connection, it is important to recognize that an investigation may be initiated and continue as long as the authorities concerned are satisfied that there is sufficient evidence of dumping and injury to justify proceeding with the case.[55]

**Defining the Product/Like Goods**

53. Revenue Canada relies very heavily on the Canadian industry to define product scope for an AD investigation. At the same time, Revenue Canada will try to persuade petitioners to exclude from the scope of the investigation products that they consider would weaken the injury case, or to limit the scope to a product range closely resembling the actual range of production in Canada.

54. Refining the definition does not always narrow the Tribunal's consideration of the class of goods. In the *tomato paste* (NQ-92-006) inquiry, the industry attempted to bring a complaint about tomato paste sold in the open market by defining the scope of the product to be limited to tomato paste in containers of 100 ounces and greater. The Tribunal, in determining whether the domestic industry had been injured, did not limit its inquiry to tomato paste produced by the domestic industry and sold in such containers, but rather considered whether there had been material injury to *all* production of tomato paste by the industry, whether sold in containers of the size defined by the product definition or consumed by the industry itself to make food products (i.e., ketchup, etc.). This is the issue of how to treat *"captive production"*.

55. Under Commerce procedures, the scope too is generally what the petitioners want it to be. The scope in U.S. investigation does not frequently change after initiation but may. Commerce can change the scope and issue scope determinations that usually do not result in great changes in product coverage - but can broaden it.

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[55] WTO ADA Articles 5.3 and 5.8.

56. In *cellular mobile telephones*, Commerce rejected the claim from respondents that discrete subassemblies should not be included because the petitioner had not sought their inclusion and because they were not the same class or kind of merchandise as the subject of the complaint.[56] Commerce examined the following criteria, which are employed by the Court of International Trade (CIT):

- general physical characteristics;
- the expectations of the ultimate purchasers;
- the channels of trade in which the product is sold;
- the manner in which the product is sold and displayed; and
- the ultimate use of the merchandise in question.

57. Commerce explained that the CIT considered these to be appropriate criteria for determining whether a new product was within the "class or kind" of merchandise described in a prior antidumping finding.[57]

58. In conclusion, Commerce noted:

> "Whether or not Motorola's petitions explicitly covers discrete subassemblies is not dispositive, *since the Department has an inherent power to establish the parameters of the investigation so as to carry out its mandate to administer the law effectively and in accordance with its intent. The Court of International Trade has recognized that the ITA has the authority to define the scope of an antidumping duty investigation.*" (emphasis added)[58]

59. Commerce explained that dumping of subassemblies was relevant when these subassemblies were exported to the USA and further processed/assembled into CMTs. Under Commerce practice relating to the identification of related parties, there would be no sales of subassemblies to un-related parties. By looking through the related party transactions to examine sales to unrelated purchasers, they were, in fact, dealing with complete CMTs.

60. It is important that complainants be very specific about defining like goods. If the investigation, and the Tribunal inquiry, are limited to products being imported and produced in Canada by the complainant, then imports will have a larger market share than if the scope had been interpreted more broadly (i.e., if other producers make competing products falling within the like goods definition). Even in cases where the attempted definition has been specific, the Tribunal may determine that the range of like products defined by the Deputy Minister is broader than the specific product of interest to the complainant. This increases the market size, reducing the market share of imports and thus reducing the prospects for an affirmative injury finding.[59] However, this is a

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[56] *Cellular Mobile Telephones* (CMTs), 50 Fed. Reg. 45448, (October 31, 1985).

[57] See Diversified Products Corp. U.S. 572 F Supp. 883 (C.I.T. 1983) Kyowa Gas Chemical Industry Co. Ltd. v U.S., 5 ITRD 2131 (1984).

[58] CMTs.

[59] See *pillowboots from Romania* (ADT-9-82). The Tribunal interpreted Canadian production more broadly than the petitioner did and found no injury.

function of determining what the like goods are; it does not and cannot involve expanding the definition of like goods established by Revenue Canada at initiation.

61. In *beer*, the subject goods were limited to the products of certain U.S. exporters, and further limited by package size to exclude products that were not imported. The limitations to packaged beer excluded from consideration production and sales of draft beer, which, at the time, was not dumped into the regional market.

62. Revenue Canada does not normally go beyond the product scope identified and sought by the complainant. They may, however, work with the complainant to ensure that like goods are not defined too broadly. To broaden the scope for a discrete class of goods without a formal complaint would be *de facto* self-initiation. If it is necessary to expand the product scope, Revenue Canada would have no alternative but to initiate a new investigation rather than expand the scope of the investigation after initiation. Thus, in heat-treated plate, when Revenue Canada, after initiation, discovered a serious inadequacy in the petitioners' definition of carbon steel plate, it self-initiated an investigation to cover heat-treated plate (and later joined the two investigations for consideration by the Tribunal).

63. In the Revenue Canada *cut-to-length plate* and *hot-rolled* investigations, "skelp" or flat-rolled steel for use in the manufacture of pipes or tubes was excluded from the investigations. Several of the Canadian producers at the time used their skelp production in their own or affiliated pipe/tube operations. At times, the Canadian mills were themselves substantial importers of skelp, a lower value product, conserving their limited production for higher value end-uses.[60] Skelp was specifically excluded from the scope of these investigations at the time of initiation. This did not, however, prevent the Tribunal considering all production of all *hot-rolled steel sheet* including skelp in its injury analysis.

**Directed Initiation**

64. Prior to the WTO ADA, SIMA authorized the Tribunal, during an inquiry, to direct the Deputy Minister to initiate an investigation into imports from additional countries where it detected potentially injurious dumping from these countries.[61] This was a feature of Canadian legislation since the Antidumping Act was introduced in 1968. SIMA has been amended so that the Tribunal may report such situations to the Deputy Minister but the discretion about whether or not to initiate an investigation rests with the Deputy Minister.[62] There has been no experience with the new law but the Deputy Minister will likely be sympathetic to such references.

65. Rodney Grey described this power of the Tribunal to the Commons Standing Committee on Finance Trade and Economic Affairs as follows:

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60 This tends to occur during periods of high demand during the upswings in the steel cycle.

61 SIMA s. 46.

62 *Ibid.*, s. 46 amended to implement WTO ADA Article 5.7.

> "The Tribunal would address itself as to whether imports of that category as described by the Deputy Minister in his preliminary determination, cause or threaten injury or material retardation and so on. But the Tribunal has the power to say, in effect: `Well, you should have looked at seven-tube transistor radios from Japan, Hong Kong, Taiwan, Mainland China and a number of other places too, and get on with that, please'. There is the power in the Bill to do that".[63]

66. The Tribunal's referral power, found in SIMA s. 46, was limited to directing the Deputy Minister to initiate investigations to prevent country hopping by those determined to dump.[64] However, under SIMA, revised to implement the WTO, the Deputy Minister may decline to initiate an investigation.[65] The Tribunal could not use this power to alter the product scope of the P.D. by making such a reference. In fact, the Tribunal has not done so. However, it is open to the Tribunal to explain, in enough detail, that the industry had missed the boat and complained about the wrong product. Even without a direction this could persuade the Deputy Minister to self-initiate or convince the industry to file a new complaint.[66]

67. In the *large motors* inquiry, the Tribunal received a request at the conclusion of the hearing to direct the Deputy Minister to cause an investigation to be initiated respecting the dumping of the subject goods originating in or exported from Finland.[67] Complainants were not aware of these sales when the complaint was filed, as these transactions had not yet been reported by Statistics Canada. The Tribunal reviewed these submissions and concluded that it was not convinced that there was any evidence that the subject motors from Finland were imported at dumped prices; and even if dumping were present, the evidence advanced by the industry failed to disclose a reasonable indication of material injury. The Tribunal rejected the request for a reference to the Deputy Minister under s. 46 of the SIMA.[68] In the so-called *plate II* inquiry, the Tribunal rejected a request for referral made by industry counsel.[69]

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63 Minutes of Proceeding and Evidence, No. 4, Commons Committee on Finance, Trade and Economic Affairs, (October 31, 1968), 77.

64 There have been referrals in a number of cases including CIT-1-86 *drywall screws*; ADT-3-84 r*ecreational camping tents*; ADT-8-81 *synthetic baler twine*; ADT-7-80 *custom steel wheel rims*; and ADT-6-78 *stainless steel, screwed end cast pipe fittings*. There have been few referrals in recent years.

65 SIMA s. 46 - to implement WTO ADA Article 5.7.

66 Canadian producers, after a no injury finding in *seamless carbon steel standard pipe from Brazil* (CIT-8-86), filed a new complaint against *welded carbon steel standard pipe from Brazil* and a number of other countries. This investigation led to an undertaking, which was terminated after several years, leading to a P.D. and an injury finding (NQ-91-003).

67 CIT-5-88.

68 TTR, 1 1990, 90 (CIT-5-88).

69 NQ-93-004.

## VIII. PRELIMINARY INJURY ASSESSMENT/REVIEW

### GATT

1. Evidence of both dumping and injury caused thereby should be considered simultaneously prior to initiation and during the course of the investigation.[1] As soon as the authorities are satisfied that there is insufficient evidence of dumping or injury to proceed, the investigation must be terminated.[2]

### Preliminary Inquiry

2. Both the Canadian and U.S. systems provide for preliminary injury review. Procedures are quite different in Canada and the USA. The USITC review is mandatory. Revenue Canada is responsible for the preliminary injury assessment in Canada. The Tribunal will only give a second opinion on Revenue Canada's decision and supporting evidence, on request.[3]

3. Preliminary injury reviews in both jurisdictions have a low threshold injury test. They are designed to weed out very weak and unsubstantiated complaints. Administering authorities are usually inclined to give complainants the benefits of the full process unless their evidence is unpersuasive (or non-existent) or counter-evidence is available that clearly demonstrates the inadequacy of the petitioner's claims.[4]

4. There have been a number of complaints rejected by the Commission. These include several inquiries of interest to Canada:

- *Steel Wire Coat and Garment Hangers* from Canada[5]
- *Frozen French Fried Potatoes* from Canada[6]
- *Certain Line Pipes and Tubes* from Canada[7]
- *Asphalt Roofing Shingles* from Canada.[8]

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1 ADA Article 5.7.

2 *Ibid.*, Article 5.8.

3 In Canada, the Deputy Minister, Revenue Canada, may also request a preliminary review by the Tribunal (SIMA s. 34(b)) and has done so on several occasions including *Hyundai* (CIT-13-87) and *ladies footwear* (RE-89-002).

4 As noted in Chapter VII, the Tribunal does not attach much weight to this counter evidence; further, in Canada there is little opportunity to get counter-evidence before the Tribunal.

5 USITC Publication 953, March 1979.

6 USITC Publication 1259, June 1982.

7 USITC Publication 2104, August 1988.

8 USITC Publication 1100, October 1980.

**CANADA**

5. The early referral on injury was included in SIMA to address the concerns of Canada's trading partners' concerns about the need for simultaneous consideration of dumping and injury. the Sub-Committee on Import Policy also to provide balance between the right of a complainant to seek a second opinion (when the D.M. declined to initiate) and the interests of consumers and users when the D.M. did decide to initiate.

6. Tribunal analysis pursuant to SIMA s. 34(b) is limited to a review of the Deputy Minister's file at the time of initiation. Because Revenue Canada does not normally disclose the existence of a complaint prior to initiation, the Deputy Minister's file is, in virtually all cases, the complaint and the Department's analysis of it.[9] The Tribunal has terminated only one investigation under a s. 34(b) review, and in that case, they relied on information from their own experience with other inquiries in the same industry in addition to that filed by the complainant.

7. The Tribunal's test in the Preliminary Injury review pursuant to SIMA s. 34(b) is not a high threshold injury test.[10] The investigation will proceed unless the complaint is totally devoid of evidence of injury.[11] Counsel for *Hyundai* decided to challenge the non-transparency of the pre-initiation process in the courts and Hyundai in Canada and Korea tried to use political and diplomatic representations in an effort to have the investigation terminated. Such initiatives do not work in SIMA investigations.

8. In one of the few preliminary injury inquiries where the Deputy Minister's file contained submissions from respondents in addition to the complainant, the Tribunal appears to have attached greater weight to the petitioners' evidence.[12] In that review, the Tribunal stated:

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[9] Revenue Canada explains that the "no publicity" rule is to prevent trade disruption and filing complaints only for trade harassment value. The WTO ADA also recognizes this possibility. However, one could conclude that the Agreement and SIMA do not attach enough weight to the need for potential respondents to make their views known as early in the process as possible. Revenue Canada is not precluded from taking account of such input; however, it is difficult for respondents to comment on a complaint that is not known to them.

[10] See *certain ladies footwear* (RE-89-002).

[11] Since SIMA was promulgated, the Tribunal has only rejected one initiation pursuant to the preliminary injury procedures under subsection 34(b) of SIMA. This was in respect of *single use hypodermic needles and syringes* (ADT-14-85). By the same token, they have only overturned one referral under subsection 33(2)(b) of a decision by the Deputy Minister not to initiate an investigation. That was in respect of *pentaerythitrol from Chile* (A-7-85). In that review, while the Tribunal found at the preliminary stage that the evidence before the Deputy Minister did reflect a reasonable indication of injury, their final injury determination was negative (CIT-11-85). In others like *wooden clothespins* (RE-90-001), the Tribunal supported the D.M.'s decision not to initiate.

[12] See *corrosion-resistant steel sheet* (RE-93-001).

> "... for at least a year before actually filing a complaint with the Department of National Revenue (Revenue Canada), the domestic producers had publicly discussed their intention of seeking antidumping protection from a broad range of corrosion-resistant steel sheet imports. In response, several importers and exporters forwarded submissions to Revenue Canada arguing that such an investigation was not warranted. All submissions received by Revenue Canada were included in the material forwarded to the Tribunal as part of the record before the Deputy Minister. The submissions raise numerous issues, including requests for specific product exclusions, requests for country exclusions on the grounds of *de minimis* presence in the Canadian market and arguments about the role of other factors in causing injury to the domestic industry. If the Deputy Minister issues a preliminary determination of dumping and an injury inquiry is held pursuant to s. 42 of SIMA then the Tribunal will further examine these *propositions and contentions*.[13] (emphasis added)

9. The Tribunal's treatment of counter-evidence in their preliminary analysis is similar to Revenue Canada's.[14] This gives little comfort to potential respondents. In the corrosion-resistant case, several exporters and importers tried to prevent an investigation by filing detailed evidence about the state of the industry. The Tribunal, however, focussed on the preliminary nature of their advice function. It seems clear they did not want to deny the industry access to a full investigation and adversarial inquiry. They explained:

> "In order to meet the requirements of s. 37 of SIMA, the Tribunal must be satisfied that there is a reasonable indication of a causal link between the dumped imports and the material injury being suffered by the domestic industry. The Tribunal is of the opinion that the evidence suggests a correlation between the injury suffered by the domestic industry, particularly the financial injury, and the alleged dumping of the subject goods. The Tribunal considers that this correlation provides a reasonable indication that the dumping has caused material injury. *However, full proof of causation goes beyond correlation and can only be determined through a full inquiry process.*"[15] (emphasis added)

10. The message is that under existing procedures, once Revenue Canada is satisfied, petitioners' claims are not likely to be rejected. Petitioners in Canada have an advantage over their U.S. counterparts at this stage of the process because the USITC preliminary injury process is open and adversarial. As noted above, respondents can and do prevail at the preliminary USITC injury inquiry, and not infrequently.

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13 *Ibid.*, 2-3.

14 See SIMA Handbook.

15 *Ibid.*, 3.

11. It would not be correct to assert that the Tribunal simply ignores evidence that does not support the industry's case. Indeed, sometimes they set out their concerns about potential soft spots in the industry's case in considerable detail as in their advice on *ladies leather footwear*:

> "Although the Tribunal agrees that the condition of "reasonable indication" has been met, the information in the Deputy Minister's file raises some concerns to the Tribunal, principally in three areas. First, the scope of the complaint encompasses a very large range of goods including women's leather and non-leather boots and women's leather and non-leather shoes. Differences in the production and sales trends experienced within these footwear classifications may be masked when analyzed on an aggregate basis.
>
> Second, the Tribunal is not entirely satisfied with the statistical information provided in the file, particularly the import statistics. These statistics are of particular importance, as they are used to estimate both the sales of imported footwear and, together with domestic shipments, the size of the overall market. As such, they have a direct bearing on the interpretation of events that might have affected the domestic industries in terms of losses of market share in 1988."
>
> "Finally, the Tribunal notes that the market for the subject goods during the period of time involved in the complainant's submission was being affected by the gradual removal of global quotas for women's footwear. This issue, like the others, will require further investigation and formal injury inquiry. In such an inquiry, public hearings and the timely provision by interested parties of all relevant information will enable the Tribunal to make a definitive finding.[16]

12. In *ladies footwear*, notwithstanding perceived deficiencies in the complaint, the Tribunal gave the footwear industry their day in court. This advance notice of the Tribunal's specific interests gave both petitioners and respondents several months notice to prepare for the inquiry. At the end of the day, the Tribunal issued an affirmative injury finding.[17]

13. The Tribunal's preliminary injury determination cannot be described as meaningful from the perspective of respondents. Only once did the Tribunal not reach an affirmative preliminary injury finding. While there is not a strong possibility of the Deputy Minister doing so, termination prior to P.D. does occur (for example in *baler twine from the USA*). However, the Tribunal reversed the Deputy Minister.[18]

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[16] *Certain ladies footwear*, RE-89-002, (September 25, 1989).

[17] NQ-89-003.

[18] See RE-93-002. In that review, the Tribunal concluded that the evidence suggested a correlation between the material injury being suffered by the domestic industry and the dumping from the USA. They noted that "full proof of causation goes beyond correlation and can only be determined through a full inquiry process". CITT RE-93-002 Statement of Reasons, 4.

14. The lack of transparency of the Tribunal's preliminary injury review has been criticized by several of Canada's trading partners because it precludes proper input/argument from respondents and favours Canadian petitioners. It is true that Revenue Canada is charged with preliminary injury assessment. However, with few exceptions, the Revenue Canada analysis is closed and non-adversarial. This system, based on what can be seen and measured by the public, is less liberal than the approach of the Commission. However, as noted above, Revenue Canada has provided statistics indicate that only about 25% of initial inquiries and about 50% of complaints lead to initiatives. See Annex A.

**USA**

15. Commerce and the Commission provide access to the complaint to all interested parties as soon as it is filed. There is no opportunity for counsel for respondents to make representations to Commerce.[19] In the USA, petitioners may discuss complaints in draft with Commerce. This is not a formal process. It is interesting that legislative changes arising out of the Uruguay Round exempting such draft complaints from Access to Information laws, nor may they be publicized.[20]

16. The legal standard in preliminary antidumping duty investigations requires the Commission to determine, based upon the best information available at the time of the preliminary investigation, whether there is a reasonable indication that a domestic industry is materially injured or threatened with material injury by reason of the allegedly Less Than Fair Value (LTFV) imports.[21]

17. In applying this standard, the Commission will weigh the evidence before it to determine whether:

> "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury;[22] and (2) no likelihood exists that any contrary evidence will arise in a final investigation."

18. The U.S. Court of Appeals for the Federal Circuit has held that this interpretation of the standard:

> "accords with clearly discernible legislative intent and is sufficiently reasonable."[23]

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19 19 U.S.C.A. s. 1673a(b)(3)(b).

20 19 U.S.C.A. § 1673a(b)(3)(c).

21 The Tribunal uses the same standard but bases their analysis on a record which is nearly always limited to petitioner's pleadings. This approach may be contrary to the general WTO ADA requirement that decisions about injury be based on *positive evidence* of the existence of injury.

22 *U.S. International Trade Commission, Publication 2647*, (June 1993), *Certain Steel Wire Rod From Brazil, Canada, Japan, and Trinidad and Tobago*, 3-4.

19. Some Commissioners have held that the statute requires that the Commission determine whether a domestic industry is "*materially injured by reason of*" the allegedly LTFV imports. They find that the clear meaning of the statute is to require a determination on whether the domestic industry is materially injured by reason of LTFV imports, *not by reason of LTFV imports among other things* (emphasis added). It is assumed in the legislative history that the:

> "ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports."[24]

20. However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury.[25] Congress also directs:

> "the Commission must satisfy itself that, in light of all the information presented, there is a sufficient casual link between the less-than-fair value imports and the requisite injury."[26]

21. In *certain steel wire rod from Brazil, Canada, Japan and Trinidad and Tobago*, the Commission stated that in making a preliminary determination, they are to determine whether there is a reasonable indication that an industry in the USA is materially injured "by reason of" the imports under investigation.[27] The Commission is required to consider:

- the volume of imports;
- their effect on prices for the like product; and
- their impact on domestic producers of the like product, but only in the context of production operations in the USA. Although the Commission may consider causes of injury other than the LTFV imports, it is not to weigh causes." [28]

22. The *principal cause* standard of the Kennedy Round AD Code was removed in the Tokyo Round revision. The Commission is not to determine if the allegedly LTFV imports are "the principal, a substantial or a significant cause of material injury "by reason of" the allegedly LTFV imports. That is, the Commission must determine if *the subject imports* are causing material injury to the domestic industry:

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[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*, 74; (H.R. Rep. No. 317, 96th Cong., 1st Sess., (1979), 46-47).

[26] S. Rep. No. 249, 75.

[27] This was the last AD investigation initiated involving Canada at the time of writing. The complaint was eventually withdrawn before the USITC definitive injury investigation.

[28] USITC, Publication 2647, (June 1993), 21.

> "When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if *unfairly traded imports are materially injuring the domestic industry*" (emphasis added).[29]

23. In *Citrosuco Paulista, S.A. v. United States*, Chairman Newquist, Commissioner Rohr and Commissioner Nuzum noted that the Commission need not determine that imports are "the principal, a substantial or a significant cause of material injury".[30] Rather, in their view, a finding that imports are a cause of material injury is sufficient. This appears to be a different standard than applied by other Commissioners[31] and may more easily lead to affirmative findings.

24. See also *USX Corp. v. United States*, ("any causation analysis must have at its core the issue of whether the imports at issue cause, in a non *de minimis* manner, the material injury to the industry").[32]

**Termination at Preliminary Inquiry Stage**

25. The USITC process is more open and adversarial than Revenue Canada's at the preliminary stage. The Tribunal has only made negative preliminary injury determination once. However, this is not an apples-to-apples comparison. Revenue Canada appears to conduct a more rigorous screening of complaints than Commerce does but this is not easy to demonstrate to respondents.[33] Further, those cases which Revenue Canada may reject in draft, or during the analysis to determine whether or not they are properly documented, are not publicized.[34]

26. The Commission must apply a low threshold test at the preliminary inquiry. Judge Watson of the U.S. Court of International Trade found:

> "the right to a full investigation was not intended to depend on anything more than a reasonable showing by a petitioner from matters fairly within its capacity to know. It was not intended to depend on a pre-investigation of conflicting evidence".[35]

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29 S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987).

30 704 F. Supp., 1101; and S. Rep. No. 249, 57, 74.

31 For example, Commissioners Crawford and Brunsdale.

32 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988).

33 U.S. practitioners representing petitioners argue that Commerce applies a rigorous standard to draft complaints.

34 See Annex A for Revenue Canada's internal accounting.

35 C.I.T., 572 F. Supp. 275 *Republic Steel vs the USA and the U.S. International Trade Commission*.

27. If this view was followed rigorously by all Commissioners in every case, then it would be quite difficult for the Commission to find in the negative in any preliminary injury inquiry.

28. This direction reflects a standard that is quite similar to the general approach followed by the Tribunal. However, the USITC Commissioners can and do assess conflicting evidence. And not all of them assess it in the same way. Commissioner Cass, citing *American Lamb*, noted:

> "When the Commission reaches a negative determination, as it has in this case, it must be clear that the evidence supporting the petition does not, standing alone, amount to a reasonable indication of material injury or the threat of material injury, or that the contrary evidence is so clear and convincing that the evidence supporting the petition cannot be said to provide *reasonable* indication of injury."[36]

29. An analysis of the Commission's reasons in *Light-duty Integrated Hydrostatic Transmissions and Sub-assemblies thereof with or without attached axles from Japan* provides some insight into its approach. The Commission attached weight to the fact that the importer, rather than using low-priced imports to gain a distribution foothold in the domestic market, appeared to have used a strong domestic position to facilitate sales of certain of its models.[37] This influenced the Commission's decision not to exclude this manufacturer/importer from the industry producing the goods in the USA.[38] Including this manufacturer/importer whose performance was impressive, enhanced the evidence of a healthy domestic industry.

30. On the question of threat of injury, the Commission majority noted:[39]

> "in view of Sundstrand's domestic BDU production operations which were begun in 1988, as well as its commitment to increased U.S. production --- there is little likelihood that Daikin will resume sales of the BDU units in the United States in amounts comparable to those of the past two years and it is extremely unlikely that Daikin will increase the level of its exports to the United States due to any increased or unused production capacity."[40]

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[36] *American Lamb*, 785 F.2d 994 (Fed. Cir. 1986). See also *New Steel Rails from Canada*, USITC Publication 2135 (November 1988) Additional Views of Commissioner Cass.

[37] USITC Publication 2149, (January 1989), 27.

[38] The Commission also concluded that the manufacturer/importer's primary interest lies in domestic production.

[39] USITC Publication 2149 (January 1989), 35, the Commission also noted that there was no evidence of price undercutting or price suppression.

[40] *Ibid.*, 33.

31. The Tribunal could not undertake this type of analysis in a SIMA s. 34(b) review - because the Deputy Minister's file will only very rarely contain the type of submissions from importers and exporters that the Commission was able to rely on in the inquiry.

32. Once petitioners in Canada pass Revenue Canada's scrutiny, they are likely to receive a full investigation than U.S. petitioners who have the, albeit limited, benefit of an adversarial procedure.

## IX. THE ANTIDUMPING INVESTIGATION

1. The next five (5) chapters analyze the investigation process and time frames. This chapter (**Chapter IX**) provides a general overview. **Chapter X** addresses the nature of the questionnaires used by both administering authorities. **Chapter XI** is an assessment of the verifications undertaken by Revenue Canada and Commerce. **Chapter XII** contains a detailed analysis of the methodologies employed for calculating dumping. **Chapter XIII** reviews how Revenue Canada and Commerce suspend investigations by accepting undertaking or suspension agreements, as well as how and when investigations are terminated in Canada and the USA.

### Time Frames

2. Several WTO ADA requirements influence time frames in investigations. These include:

- No provisional measures may be applied unless there has been a preliminary determination of dumping (and injury).[1]

- Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.[2]

- The provisional period shall be no more than four months (six months on the request of exporters representing a significant volume of trade).[3]

3. Investigations shall, except in special circumstances be concluded within one year and in no case more than 18 months after their initiation.[4]

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[1] WTO ADA, Article 7.1(ii).

[2] *Ibid.*, Article 7.3.

[3] *Ibid.*, Article 7.4, also provides that if the importing country imposes a provisional duty lower than the margin of dumping, the 4 and 6-month periods may be 6 and 9 months respectively. This latter provision was not included in Article 10.3 of the 1979 AD Code. These general rules establish the time frames for reaching both the preliminary and final determinations of dumping as well as for the definitive determination of injury.

[4] *Ibid.*, Article 5.10.

**CANADA**

4. SIMA provides for 90 days (which may be extended to 135 days) for Revenue Canada to arrive at a Preliminary Determination (P.D.) of dumping.[5] A further 90 days are available to conclude the investigation and, if appropriate, to issue a Final Determination (F.D.).[6]

5. Between initiation and the P.D. any interested party may seek from the Tribunal an opinion as to whether or not the evidence before the Deputy Minister at the time of initiation contained a reasonable indication of material injury (or threat thereof). This reference must be made within 30 days after initiation and the Tribunal has 30 days to issue its advice.[7]

6. Revenue Canada has substantially less time (90 days) than (140 days) Commerce between initiation and P.D.[8] Further, Revenue Canada undertakes their on-site verification of exporter responses prior to P.D., not afterwards as Commerce does. In addition, Revenue Canada's public notices must be translated into the other official language. All of these factors combine to significantly reduce the time available for analysis and determining preliminary dumping margins.

7. However, it is Revenue Canada policy to extend the time period for P.D. only in exceptional circumstances. In the past, there have been extensions to permit additional time to conclude negotiation of an undertaking.[9] In a few instances where the issues were very complex - e.g., AD/CVD *induction motors from Brazil*, CVD *grain corn from the USA* - and the 1992/94 flat-rolled steel cases, the Department extended the time period to 135 days because additional time was needed to do their job properly.

8. There must, of course, be a balance between the prompt availability of relief and the accuracy of the calculations. If margins are overestimated at P.D., this may inhibit trade during the provisional period but it is misleading to complainants who may not receive the protection they anticipated.[10]

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5 SIMA s. 38(1) and s. 39. This preliminary determination is an "estimate" (see SIMA 38(1)). It is not subject to review by the Federal Court or a Binational Panel.

6 SIMA s. 41(1).

7 SIMA, s. 34(1)(b) and s. 37(b)(iii).

8 Actually, Commerce minimum target time between receipt of complaint and P.D. is 141 days. Revenue Canada's is 161 days or less (21 days to proper documentation + 30 to initiation + 90 to P.D.).

9 Because SIMA no longer permits the acceptance of undertakings before the P.D., this is no longer a valid reason for extending the provisional investigation period.

10 Experience suggests that in "estimating" at P.D., Revenue Canada will reject evidence they are not comfortable with but provide an opportunity to clarify the record before the F.D.

9. The Deputy Minister, pursuant to s. 35(1) SIMA, may terminate an investigation before he makes a P.D. if he determines that dumping is *de minimis* or volume are negligible or that there is no evidence of material injury.

10. At P.D., if one or more exporters have negative, nil or *de minimis* dumping margins but there is significant (more than *de minimis*) dumping by other firms included in the investigation, it will continue. If imports from a country are negligible or dumping from a country is *de minimis* that country will be excluded.[11] This does not apply to industrial firms unless they are sole exporter from a country. Commerce on the other hand will exclude firms with *de minimis* margins. It is possible that there could be positive margins found at F.D. for the firms not estimated to be dumping at P.D. (but unlikely in our experience). Note that in cold-rolled steel sheet, there were three U.S. producers who received nil margins. This did not exclude them from the investigation (as Commerce would do). Indeed, the Tribunal did not exclude from its injury finding the U.S. producers with nil margins, although it is within their competence to do so.[12] Revenue Canada does not recognize that companies dump; countries do not.

11. The following investigations are among those terminated by Revenue Canada before P.D. on grounds of:

no injury

- synthetic baler twine from the USA[13]

no dumping or *de minimis* dumping

- polyester yarn (Mexico),
- spandex yarn (Korea),
- polyester filament fabrics (USA),
- synthetic baler twine (Portugal).

12. The Preliminary Determination is said to be an "administrative" act that is virtually unreviewable. NAFTA Panel review is not available for a P.D. since it is not a "definitive decision" within the meaning of SIMA and the NAFTA. The only other recourse, an application under Federal Court Act s. 18, would only be available in exceptional circumstances where there had been

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[11] SIMA s. 38 and 41 do not require findings by country nor decline exclusions by firm within a country. However, Revenue Canada will only exclude countries from a P.D. or F.D. this may make some sense with respect to a CVD investigation but in AD, individual firms dump (or do not). Countries do not dump. Revenue Canada may be relying on the definition of "negligibility" which applies to countries. However, dumping margins are firm-specific and the definition of "insignificant" (SIMA s. 2.1) relates to the activities of individual firms.

[12] See microwave ovens (ADT-9-81) in which the Antidumping Tribunal excluded Matsushita by name because their overall margins of dumping was less than 0.25 per cent.

[13] However, the Tribunal on referral under SIMA s. 35(2)b, rendered advice that there was a reasonable indication of injury. This resulted in a P.D. and an inquiry before the CITT (NQ-93-003).

a clear excess of jurisdiction or breach of natural justice committed by the Deputy Minister that, by its nature, would not be amenable to a correction in the Final Determination.[14]

13. The Deputy Minister must reach a conclusion as to whether the imposition of provisional duties is necessary to prevent injury, retardation or threat of injury.[15] To date, the Deputy Minister has not concluded that the imposition of provisional duties is not necessary.[16]

14. After the P.D. is made, importers are liable for provisional or estimated antidumping duty on all subject goods imported from the date of the P.D until the Tribunal makes its definitive injury decision.[17] In some investigations, exporters may raise their price to the "normal value" and eliminate the need to pay AD duty or post a bond. The importer has the option to post security instead of paying duty for imports during the provisional period.[18]

15. The P.D. by Revenue Canada is an "estimate". Revenue Canada provides detailed disclosure to respondents and their counsel at the P.D.[19] They receive comments and accept additional information prior to the F.D. Counsel for petitioners are given a general explanation of the procedures employed, but this does not go much beyond the description found in the Statement of Reasons issued by the Department with the P.D.

16. Revenue Canada discloses the names of importers at P.D. and F.D. as well as the margins of dumping applying to individual importers. There does not appear to be a parallel practice in the USA. Indeed, the exact amount of the dumping margin on individual sales may be protected as proprietary information.[20] Disclosure of detailed information about importers and their dumping margins can be of assistance to complainants in preparing their injury arguments. In this connection, it is also relevant that authorities assessing injury are directed by the WTO ADA to examine a new factor - *the magnitude of the margin of dumping*.[21]

17. In the Statement of Reasons and at disclosure of the P.D., Revenue Canada will address arguments made by counsel for respondents (and petitioners) after the P.D. and address additional

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14 *Shaw Industries vs. Deputy Minister*, T 439-92, March 17, 1992 (FCA).

15 SIMA s. 8(1).

16 Canadian Industrial Sweetener Users argued that duties were not required in refined sugar. There was no relief granted. The Tribunal eventually found there was no injury, but a threat of injury.

17 SIMA s. 8(1).

18 SIMA, s. 8(1)d.

19 This is not full disclosure because, unlike the USA, Revenue Canada does not make available the verification report, even to counsel. This is an important deficiency.

20 19 CFR § 353.4(7).

21 Article 3:3 and reflected in SIMR 37.

information filed to address Revenue Canada's concerns at P.D. or to explore alternative methodologies.[22]

18. After disclosure, which can involve some very spirited discussions about methodology and Revenue Canada's use of estimates, the parties may make additional submissions. The Department's use of estimates at P.D. has been described by counsel for respondents as beefing up the margins to:

a) discourage trade during the provision period, which is used by petitioners as "evidence" that the foreigners in the dock cannot sell without dumping;

b) ensure a high dumping margin reflected in the Tribunal's analysis and the pre-hearing staff report.

19. However, Revenue Canada, in most non-BIA cases, has avoided inflated estimates in part because they are not doing a great service to petitioners by setting a high P.D. and arriving at a substantially lower F.D. Petitioners may put more effort/expense into the Tribunal inquiry if they anticipate substantial relief from the process. If that prospect is diluted by a lower F.D., they will have been denied other options and may need to adjust their strategy. This is a very important issue given the increased emphasis on margin analysis in the WTO ADA.[23]

20. During the provisional period (between the P.D. and F.D.), Revenue Canada officials may request additional information from respondents. These requests can be related to aspects of their own investigation or they may request verification or confirmation of points raised by or on behalf of respondents. Revenue Canada may choose to schedule an additional verification visit to confirm the validity of this new information, though a second verification visit is not usually required.

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[22] See *beer*, where counsel for petitioners disputed adjustments for advertising allowances because they claimed spill-over advertising affected the B.C. market. Revenue Canada did not accept these arguments and would not grant counsel for petitioners access to the confidential information filed by respondents.

The Customs investigation in *beer* was unique in that the Director of Investigation and Research under the Competition Act made extensive submissions to Revenue Canada about how SIMA should be interpreted and how dumping should be calculated. These submissions paralleled and supported the submissions of respondents. Revenue Canada made non-confidential versions of these submissions available to counsel for petitioners (under a standing access request). Petitioners were able to make counter-submissions. The arguments of the Director and respondents did not prevail.

The Director of Investigation and Research has a right to intervene in the SIMA process to protect competition (Competition Act s. 125). He has a specific right to intervene in public interest matters before the Tribunal. The Director's involvement is infrequent without any discernable pattern.

[23] While the Tribunal does not look behind or query the Deputy Minster's dumping calculations in reaching its decision on material injury, the magnitude of margins of dumping can have substantial bearing on whether or not the Tribunal considers the dumping advantage to be significant enough to cause material injury.

21. SIMA, post-WTO ADA, provides that an undertaking may be concluded only after the P.D.[24] This should make the undertaking provisions somewhat easier to use. Exporters may request the completion of an investigation and the injury inquiry.[25] Should that inquiry find there is no injury or threatened injury the undertaking will be terminated. This improved the credibility of the system but may significantly reduce the attractiveness of undertakings to petitioners.

22. Revenue Canada's F.D. is generally issued coincident with or a few days before or after the beginning of the Tribunal's public hearing. This decision, which clears up uncertainties at the P.D. and addresses arguments made by respondents (and sometimes by petitioners), is subject to judicial review by a NAFTA Chapter 19 Panel or a review by the Federal Court of Canada.

23. At F.D., Revenue Canada may, in some cases, repeat the process of advising exporters how normal values were determined. On request, the investigators will provide counsel, who may be accompanied by clients, with details of methodology, spreadsheets, worksheets and related computer diskettes. These conferences are generally quite thorough and the investigators are generally prepared to correct mathematical errors, and will discuss methodology. Only rarely will they change margins at this stage for other reasons, i.e., misapplication of laws or regulations.

24. Disclosure of confidential information by Revenue Canada is not as transparent for petitioners and their counsel as Commerce disclosure.[26] The Tribunal, on the other hand, has a system for protection from disclosure of confidential information envied by practitioners in other jurisdictions.

25. It is very difficult for counsel for petitioners to address in any meaningful way what Revenue Canada has done without access to confidential information. In their public statements of reasons, Revenue Canada will often limit itself to a short explanation of which section of the SIMA and regulations have been used and why. When dealing with both petitioners and respondents in confidence, Commerce disclosure practices are much more complete. Commerce also tends to address the transactions in a much more detailed way in Federal Register notices than Revenue Canada's statements of reasons.

26. The extent and depth of public disclosure by Revenue Canada in their Statements of Reasons has improved substantially in recent years. There is reluctance to go further due to concerns about protection of confidential information. Disclosure by Commerce is still more systematic, consistent and detailed than that available from Revenue Canada.

27. The Tribunal's definitive injury inquiry begins with the Preliminary Determination (P.D.). The Tribunal must issue its finding on injury within 120 days of the P.D.[27] Its detailed reasons must follow within 15 days of the finding.[28]

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[24] SIMA s. 49(2)b.

[25] SIMA, s. 49(3).

[26] Canadian exporters who have been caught up in Commerce investigations argue, with some conviction, and with some justification, that access available to counsel in the USA permits petitioners to play a more effective role in the process and to ensure that the dumping margins calculated by the administering authority are adequate.

**After the Injury Finding**

28. If the Tribunal makes an affirmative injury finding, SIMA provides for a review for the purpose of establishing normal values and precise duty liability for goods imported during the provisional period.[29] It is also possible to obtain from Revenue Canada prospective normal values or export prices at which goods may enter into Canada at an "undumped price". Sales at or above these prices would not attract dumping duties, notwithstanding the existence of an injury finding, because dumping is deemed to be eliminated. Generally, Revenue Canada will provide foreign exporters with normal value rulings after the material injury finding. However, in certain circumstances, Revenue Canada may estimate normal values even earlier, indeed even at the P.D. and at the F.D. so that pricing adjustments may occur earlier. This system is not designed to permit exporters to evade dumping duties. It permits them to raise prices rather than pay duties.

29. In the ongoing enforcement of an injury from dumping finding, Revenue Canada will periodically (usually every year) conduct a review investigation much like the original investigation in order to obtain information necessary to update normal values. Verification visits are usually scheduled to test these replies. Where marketing conditions permit, Revenue Canada may issue "normal value multipliers" or percentages that can be applied against list prices so that exporters can calculate normal values.[30] Exporters have an ongoing obligation to report any changes in their home market pricing practices so that Revenue Canada can adjust normal value rulings in a timely way, if necessary. Failure to disclose such changes or fraud may result in retroactive imposition of duties.

30. SIMA s. 56 through s. 60 deal with Revenue Canada's power to review the circumstances of importations on their own initiative or at the request of importers (or petitioners), and to determine antidumping duties while findings are in effect.

**USA**

31. Antidumping investigations can be initiated by Commerce or by petition.[31] Within 20 days after a petition is filed, Commerce determines whether the petition properly alleges the elements necessary for relief (material injury to a domestic industry by reason of dumped imports), includes information reasonably available to the petitioner supporting the allegation, and is filed by an interested party as defined in the relevant sub-sections of 19 CFR § 353.13(a). If the determination is affirmative, Commerce initiates an investigation to determine whether dumping exists. If the determination is negative, the Secretary will dismiss the petition in whole or in part and may terminate the proceedings.[32]

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[27] SIMA s. 43(2)b.

[28] SIMA, s. 43(1).

[29] SIMA, s. 55.

[30] Subject to audit and verification at the next annual review.

[31] As noted earlier, this self-initiation authority is seldom exercised by Commerce.

[32] 19 CFR § 353.13(c).

32. Within 45 days after a petition is filed or an investigation is self-initiated by Commerce, the Commission determines whether there is a reasonable indication that injury to a domestic industry exists by reason of dumped imports. If the determination is negative, the proceedings end. This procedure has been discussed earlier.

33. If the Commission's preliminary determination of injury is affirmative, within 160 days after a petition, is filed or 140 days after an investigation is initiated, Commerce will make a preliminary determination, based on the best evidence available at the time, of whether there is a reasonable basis to believe or suspect that dumping/sales at less than fair value (LTFV) exists.[33]

34. Under U.S. practice, extensions may be requested by interested parties. These requests, which are frequent, may be designed to give petitioners' counsel additional time to analyze the submissions of respondents and to offer advice and assistance to the investigators. As noted earlier, Revenue Canada only extends the P.D. to 135 days in unusual or novel circumstances.

35. Commerce may issue a negative preliminary determination of dumping and then proceed to conduct its verification and final determination review. The process in the USA continues. This procedure, which appears to run counter to the WTO ADA, appears to be based on an argument that Commerce's preliminary results are not verified.[34] As a practical matter, this creates a strong incentive counsel for petitioners to be much more aggressive and imaginative in their representations to Commerce about the inadequacy of submissions by respondents.

36. Commerce's disclosure in its public statements of reasons is very complete. In addition, counsel have full access to most confidential information under Administrative Protective orders.[35] All parties may comment on Commerce's preliminary determination and on the verification report. Commerce arranges conferences where these issues can be discussed. Case briefs and rebuttal briefs may be filed before the hearing.[36] All comments received, whether from petitioners or respondents, are addressed in the final determination and Commerce explains how they have addressed these comments.

37. The petitioner may gain more from the adversarial proceedings before Commerce at this stage than the respondent. However, having access to confidential information, both parties are better able to address issues related to developing dumping margins. Disclosure at Commerce is not designed to facilitate preparation of submissions to the Commission about injury. In this connection, it is very relevant that even under APO access, it is possible for respondents to protect their customer names and lists.[37]

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[33] In extraordinarily complicated cases, this determination is made within 210 days.

[34] Article 5.8 of the WTO ADA states: "... an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

[35] Customer names are replaced by codes.

[36] 19 CFR § 353.38.

[37] The APO is narrowly framed.

38. If the preliminary determination of dumping is affirmative, Commerce (a) requires bonds or cash deposits to be posted for allegedly dumped imports in an amount equal to the estimated margin of dumping, and (b) continues its investigation.[38] No additional duties may be collected if it is determined that the provisional estimate is insufficient. However, the Court of International Trade has ruled that this applies only in the case where the importer makes a cash deposit. Where there is a bond posted, there is no cap on provisional liability.[39] This is a more restrictive practice than envisaged by SIMA and, in our view, the WTO ADA Article 10.3 which refers in the context of non-collection of amounts additional to the duty paid or payable or the amount estimated for the purpose of the security. It forces exporters to post cash deposits if they were to limit their liability.

39. Within 75 days (or 135 days upon the requests of an exporter when the preliminary determination was affirmative or petitioners when the preliminary determination was negative) after its preliminary determination, Commerce makes a final determination of whether dumping exists.[40] If this determination is negative, the proceedings end, suspension of liquidation is terminated, bonds are released and cash deposits are refunded.[41]

**Suspension of investigations**

**USA**

40. An investigation can be suspended prior to a final determination of dumping by Commerce if (1) exporters accounting for substantially all of the imports of the merchandise under investigation agree to eliminate the dumping, or to cease exports of the merchandise to the USA within six months after suspension of the investigation; or (2) extraordinary circumstances are present and the exporters described above agree to revise prices so as to completely eliminate the injurious effect of the imports of the merchandise under investigation.[42] However, if within 20 days of the date of publication of the notice of suspension, the exporters described above or any party involved in the investigation requests continuation of the investigation, the suspended investigation must be continued.[43]

41. The Commission, upon receipt of a review petition, shall determine whether the injurious effect of imports is eliminated completely by the agreement.[44] If the Commission determines that the

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38 19 U.S.C.A. § 1673b(d)1.

39 *Zenith Electronics Corp. vs. CIT* (1991) 770 F. Supp 648.

40 19 U.S.C.A. § 1673d(a)1.

41 *Ibid.*, § 1673(d)(c)2.

42 *Ibid.*, § 1673 c(b).

43 *Ibid.*, § 1673 c(g).

44 *Ibid.*, § 1673 c(h)(1).

injurious effect is not eliminated, then the investigation must be resumed.[45] If Commerce determines that an agreement that resulted in suspension of an investigation is being violated, the investigation is resumed and an antidumping duty order may be issued.[46] An antidumping duty order would be issued if an interested party had previously requested continuation of the suspended investigation, and the Commission and Commerce subsequently made affirmative final determinations.[47]

**Injury Inquiry**

42. If Commerce's final determination of dumping is affirmative (following an affirmative preliminary determination), the Commission conducts an investigation and makes a final determination of whether a domestic industry is being materially injured by reason of dumped imports before the later of (1) the 120th day after Commerce makes its affirmative preliminary determination, or (2) the 45th day after Commerce makes it affirmative final determination. In a case where Commerce's preliminary determination is negative, the Commission's final determination on material injury is made within 75 days after Commerce's final affirmative determination on dumping.[48]

43. If the final determination of the Commission is affirmative, an antidumping duty order requiring imposition of antidumping duties is issued within 7 days of notification of the Commission's determination.[49]

44. Interested parties who made submissions to the Subcommittee of the Commons Standing Committee on Finance Trade and Economic Affairs, (which was charged with implementation of the Tokyo Round changes to AD legislation) were adamant about the need for more prompt relief from antidumping investigations. However, it should be recognized that translation requirements effectively make the Revenue Canada preliminary investigation substantially shorter than it appears.

45. In the 1992/93 flat-rolled steel investigations, it was Revenue Canada's practice to extend the period for the P.D. to 135 days because of the number of countries involved and the high volume of shipments (many truckloads each requiring a separate entry and invoice) in the trade between the USA and Canada. Extensions of the preliminary investigation period benefit the Department by giving investigators more time to do their work, but they do not benefit respondents because respondents do not receive more time to file their submissions. Revenue Canada provides limited flexibility for late filing responses in some investigations. These extensions also delay the introduction of provisional duties. A representative of the Canadian steel industry, has however,

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45 *Ibid.*, § 1673 c(h)2.

46 *Ibid.*, § 1673 c(i)(1)(B) and  1673 c(i)(1)(C).

47 *Ibid.*, § 1673 c(b).

48 *Ibid.*, § 1673 d(b)(2).

49 *Ibid.*,  1673 e(a)(1).

noted that the initiation of an investigation, and indeed the rumours of initiation of an investigation, can reduce imports as exporters back away from a market.[50]

**General Comments**

46. U.S. petitioners, through counsel, have access to the confidential submissions of respondents. This access enables counsel to petitioners in the USA to make representations to Commerce about the treatment of respondents' submissions. Representatives of the Canadian Steel Producers' Association claim these procedures permit U.S. petitioners to secure higher dumping margins by testing the submissions of respondents. Investigations where Commerce's F.D.s are higher than the P.D. would support this view. However, some U.S. sources advise that the principal benefit is to provide industry expertise, through their comments, to assist Commerce staff who are not commodity experts. This too may result in higher margins but Commerce does not always accept petitioners' comments, indeed, they may accept arguments by respondents.

47. Similar access is not normally granted in Canada, notwithstanding that SIMA envisages it. Counsel to some petitioners consider that this places them at a disadvantage.[51] Others consider Revenue Canada will ensure that the dumping margins are properly calculated.[52] It is understood Revenue Canada was concerned about being second-guessed by counsel for petitioners within very tight time frames that Parliament was loathe to see extended. However, as already noted, officers of

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50 Testimony of Donald Belch (Stelco) Public Transcript (NQ-92-007), 825.

51 Revenue Canada would provide access where the respondent declined to provide a proper edited public version of their response.

52 If the respondent fails to provide a detailed non-confidential summary of its submissions, Revenue Canada would likely grant access to the confidential filings. See also Electrohome Ltd. and Deputy M.N.R., 11 CER 31, where Rouleau J. explained:

> "Disclosure of information, which is an essential element of the scheme and purpose of the Act must be balanced against some measure of reassurance to foreign companies that the confidential information with which they entrust our public officials will not be disclosed upon request. Consequently, even if I were persuaded that the word "may" in subs. 84(3) could have two possible interpretations I would be precluded from finding that it was mandatory as such a finding would fail to achieve the manifest purpose of the Act. The court should avoid a construction which would reduce the legislation to futility and should rather accept the construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. Were I to accept the applicants' argument that once a request is made for confidential information the Deputy Minister no longer has any discretion in the matter, except to set out the terms and conditions under which it was release, I would be rendering the confidentiality provisions of the Act null and void. In effect, there would be little point in a foreign company designating the information provided by it as confidential since the Deputy Minister would have to disclose it upon request in any event."

the AD/CVD Division at Revenue Canada consult with industry officials early in an investigation to ensure they understand the industry, cost structures and production processes.

48. Access to confidential information in the USA may often complicate the investigation for respondents and add to time and cost burdens but enhances petitioners' confidence in the system.[53] Such access and related analysis and submissions, however, impose substantial additional cost burdens on both petitioners and respondents. If Revenue Canada were to adopt Commerce practice, the cost of compliance for respondents and the cost of pursuing a complaint for petitioners would increase significantly and would likely delay provisional relief.

**Which System Works Better?**

49. Differences in product coverage, time periods and the extent of cooperation may influence difference. However, a review of the records will demonstrate that both Commerce and Revenue Canada find significant margins. It is not enough to note that U.S. integrated mills generally received lower margins from Revenue Canada than Canadian mills did from DOC. This may be due to several factors, including timing, the mix of exports for each mill and the relative importance of exports to Canada or the USA, to producers in each country. A review of all exporters from all countries will demonstrate roughly similar results by both DOC and Revenue Canada.

50. While the results of U.S. investigations of Canadian steel exports reflect higher dumping duties than the Canadian investigations of the principal U.S. integrated mills, this may be due to a different set of facts. During part of the investigation period, Canadian exporters were at an exchange rate disadvantage that had made their products more expensive in the USA, and conversely imports less expensive in Canada. It is not intended to review the relative merits of the determinations by each investigating authority in this report. The following extracts from Tribunal Statements of Reasons may assist in understanding the relatively low levels of dumping found against the larger U.S. mills. In *plate*, the Tribunal referred to U.S. exports as "*niche*" products.[54] The prices of U.S. imports were substantially above the prices for subject goods in the Canadian market.[55] The price of U.S. plate over the review period dropped by only 4 per cent.[56] On the other hand, Canadian exports increased sharply in 1992 and average prices declined.[57]

51. These flat-rolled steel determinations indicate in a practical sense that the Canadian system as managed by Revenue Canada is no less effective in determining the extent of dumping than the U.S. procedures as administered by the U.S. Department of Commerce. Leaving aside the margins found

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[53] Access to information is not a new concept in the WTO ADA. A footnote to Article 6.5 states "members are aware that in the territory of certain members, disclosure [of confidential information] pursuant to a narrowly-drawn protective order may be required".

[54] NQ-92-007 Statement of Reasons, 20-21.

[55] *Ibid.*, 15 (table).

[56] *Ibid.*, 19.

[57] *Ibid.*, 14 (table).

on bilateral trade, the rates against third country exports are or should be sufficient to have a substantial chilling impact on trade. Indeed, imports of corrosion-resistant steel from Europe, like Canadian exports of plate (where Stelco and Algoma are subject to very high dumping deposits).

52. Margins established on the basis of best information available (BIA) and "all other" rates warrant comment. In the USA, the "all others" rate is a weighted average of the rates applying to all designated respondents found to be dumping, including those who receive BIA. Zero and *de minimis* margins are excluded. In Canada, the "all others" group received the weighted average rate applicable to all verified respondents other than those receiving BIA rates. Revenue Canada's reasoning is that companies which have not been requested to respond, should not be penalized for the shortcomings of others. Had the USA followed this procedure in *plate*, Algoma's rate would have been *1.47* per cent, not *61.95* per cent.

53. The WTO ADA now requires that the "all others rate" exclude zero and *de minimis* margins and margins established on the basis of facts available.[58] This will increase all others rates in Canada and reduce "all others" rates calculated by Commerce.[59] Neither Revenue Canada nor Commerce will exclude rates determined using partial BIA.[60] In exceptional cases, where there are only zero, *de minimis* or are established entirely using BIA, Commerce may use a weighted average of the margins found, which, in my view, would include BIA margins because a zero margin in this view is not a margin of dumping.[61]

54. In the flat-rolled steel investigations there were a number of cases in which the Canadian exporters' responses were deemed to be deficient, in whole or in part, by Commerce and either full or partial BIA was applied. The most serious consequences for non-respondents, such as Algoma, were in *plate*, where Stelco did not respond fully to the Commerce cost of production questionnaire.[62] The U.S. integrated mills were not subject to BIA by Revenue Canada in any of their responses. There were, however, a number of cases where Revenue Canada changed the allocations made by exporters based on U.S. GAAP. This could be harder to do under the WTO ADA.[63]

55. Revenue Canada's sampling approach in corrosion-resistant steel substantially increased the weighted average preliminary margins in that investigation. In the corrosion-resistant investigation, there were only two designated exporters that could have provided cost-of-production information.

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58 Article 9.4.

59 SIMR s. 25.2.

60 19 U.S.C.A. § 1673 d(c)(5)(A).

61 *Ibid.*, § 1673d(c)(5)(B).

62 The company has explained they would have had to change their costing system in order to respond. Had the WTO ADA been in effect, Annex II:5 which in fact mirrors the approach taken with Algoma in OCTG, information based on Stelco's records would have been deemed reasonable.

63 Article 2.2.1.1

One did. There were numerous service centre and broker exporters who could not. It is very difficult for non-producers to respond properly to Revenue Canada's questionnaires in a complete manner. This is because the producer must provide Revenue Canada with cost of production information to satisfy the requirements of SIMA s. 16(2)b and the cost of production information required by Part D of the questionnaire. Without a complete questionnaire response, Revenue Canada will estimate normal values based on best information available (BIA). Revenue Canada imposed a 166 per cent rate (62 per cent margin of dumping to some 20 U.S. exporters).[64] Only one of these was in a position to respond fully based on their own records.[65]

56. Revenue Canada through very selective sampling has remedied a deficiency, noted by the Tribunal, in hot-rolled, that they had no knowledge of the actual extent of dumping by service centres and brokers because Revenue Canada had not investigated them.[66]

57. The information provided to the Tribunal about most of these service centres, who were designated by Revenue Canada, is not based on their own selling experience.[67] The rate applied is the rate for the highest margin of dumping found on any transaction reviewed during the investigation because they were designated and did not respond. As noted earlier, it is very difficult to legislate or regulate administrative zeal. Had Commerce done this to Canadian exporters, a diplomatic note would have been delivered before the ink was dry on the P.D.

58. Revenue Canada seems to be modelling some of their approach and practices on those of Commerce. "Commerce does the same thing" is a line that they reportedly used frequently in verification meetings since mid-1992. Revenue Canada are confident that they will be upheld on appeal; they consider that the decision by a Binational Panel in *gypsum board* gave them additional scope to increase the cost base in constructed cost determinations to include a wide range of non-operational costs they would not have included before *gypsum board*.[68]

59. Revenue Canada's tougher approach was not limited to U.S. service centres. In the case of Sweden, a German trading company exported Swedish products to Canada. The German company

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[64] The formula for converting dumping margins to dumping duties, applied to export price is:

$$\frac{100}{\text{n.v.} - \text{e.p.}} - 1 \times 100 \quad \text{In this case} \quad \frac{100}{100 - 62} - 1$$

$$= \frac{100}{38} - 1 = 2.66 - 1 \text{ or } 1.66 \times 100 = 166\%$$

NOTE: the dumping margin was actually 62.35 rounded down for publication to 62%

[65] *Certain corrosion-resistant steel*, Statement of Reasons, (March 31, 1994).

[66] NQ-92-008

[67] The only service centre which persuaded its producing mill to provide cost back-up were not dumping and received a P.D. of zero per cent.

[68] This is discussed in more detail in Chapter XII-60, paragraph 175.

declined to respond. The German company's antidumping deposit rate was set at 166 per cent. All Swedish exporters are subject to a provisional duty of 39.9 per cent, notwithstanding there were no direct shipments from Sweden to Canada.[69]

60. Revenue Canada uses a very punitive BIA methodology on non-respondents and to address incomplete or inaccurate submissions. Revenue Canada is more punitive than Commerce. Revenue Canada will generally use the highest margin of dumping found for any verified participant in the investigation as the basis for a BIA margin.[70] They do not normally rely on the petitioner's estimate of dumping (unless there are no verified respondents). This has resulted in higher BIA margins than used by Commerce in most of the flat-rolled steel inquiries.

61. In the USA, a designated respondent may, should they conclude it would be more advantageous, decline to respond and accept the petitioner's estimate.[71] In Canada, this gamble would be extremely risky if others in the investigation were to co-operate and generate high margins on some sales. Non-cooperation in a Revenue Canada investigation will almost certainly preclude further shipments to Canada until proper normal values have been established.

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69 Sweden was added to the investigation at the last moment when import statistics disclosed imports of Swedish origin. Revenue Canada's Initiation Notice - *Corrosion-Resistant Steel* (November 17, 1993), Appendix 2.

70 The same approach was followed in *refined sugar* (PB-95-001) - letter from the Revenue Canada to E.D.&F.Man (Sugar) Ltd., (March 17, 1995). See also Statement of Reasons in *dry pasta*, (January 12, 1996).

71 Commerce need not use the petition rate. In *flat-rolled steel*, because Sidbec co-operated but "failed to provide the information required in a timely manner or in the form requested", Commerce applied BIA, which was the higher of the highest verified rate or the average petition rate. They took Stelco's calculated rate of 48.29 per cent. Statement of Reasons F.D., 5.

## X. QUESTIONNAIRES

1. The information needed to determine whether dumping exists, and to what degree is obtained by sending importers and exporters requests for information (RFI) or questionnaires. Because of the development of strategic alliance, mergers and globalized production, these questionnaire have over time become more detailed and complex. Respondents frequently complain about the length of questionnaires, the difficulty in understanding requirements, the limited time available to complete them and penalties for tardiness, incompleteness or inaccuracy.

### Information/Response Requirements

2. After initiation, Commerce sends questionnaires to the foreign manufacturers seeking information relevant to the case. These are normally to be answered within 30 days, although short extensions of time are granted for good cause.[1] An antidumping questionnaire usually requests pricing information covering a period 150 days before and 30 days after the first day of the month during which the petition was filed but the Department will use a different period if it seems more appropriate.[2] The Department will usually examine at least 60 per cent (and often as much as 85 per cent) of the dollar volume of exports to the USA during the time period in question, so small producers or exporters may not receive questionnaires.[3]

3. Within 30 days of the publication of the notice of initiation, a small producer or exporter wishing to participate in the proceedings may submit a request for exclusion from any antidumping or countervailing duty order that may be issued. The requester must certify that *inter alia* there is no dumping. The Department will include the company in the investigation if possible.[4]

4. The day an investigation is initiated, Revenue Canada normally sends questionnaires to all known exporters and importers. In some cases, if additional importers and exporters are detected, they will be added to the investigation. In recent investigations, particularly the *flat-rolled steel* investigations, Revenue Canada, faced with large volumes of exports and shipments, chose to adopt a sampling technique similar to that employed by Commerce.

5. In the flat-rolled steel investigations, Revenue Canada sent questionnaires to all known exporters. Exporters accounting for at least 60 per cent of the volume in each country were *designated* as mandatory respondents. All other exporters were placed in a "voluntary" category. Revenue Canada made it clear that if exporters in the *voluntary* category chose to respond, there was no

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[1] In the flat-rolled steel investigations, Commerce provided 10 days for response to Part A and 45 days for response to Parts B, C and D.

[2] 19 C.F.R. § 353.42(b). Because of the provisions of WTO ADA Article 2.2.1 (footnote 4), this period will usually be a year, effectively doubling the response burden.

[3] *Ibid*.

[4] This procedure is particularly important in antidumping investigations because a producer or exporter that is not investigated will be subject to the "all others" rate. 19 U.S.C.A. § 1673d(5)(B).

guarantee that their response would be verified.[5] Our interviews with Revenue Canada officials indicate that this methodology was chosen in view of the large number of potential respondents and the number of individual shipments, particularly from the USA, where the most common mode of shipment is by truck. This Revenue Canada practice has now been authorized specifically by the SIMA.

6. Revenue Canada permits 37 days for a response, that is, 30 days to prepare the response and 7 days for mailing. This is consistent with the Decision of the GATT Antidumping practices Committee dated 15 November 1983, which is now reflected in the WTO ADA as Article 6.1.1, clarified by footnote 15.[6] As noted above, Commerce has different reply deadlines for the various parts of the response.

7. One would expect that since both the USA and Canada are signatories to the WTO ADA, their procedures and information requirements would be similar. The CSPA explained that the Commerce questionnaires are far too detailed, complex and burdensome. Similar complaints with respect to Canadian questionnaires have been received from the Canadian Importers Association and several exporters involved in recent investigations by Revenue Canada. Canadian steel producers involved in investigations in both Canada and the USA claim that the compliance burden for Commerce investigations is much more onerous than Revenue Canada's. The nature of the information requested in recent Revenue Canada and Commerce questionnaires in investigations was compared for this study. See Annex B.

8. Article 2:4 of the WTO ADA which requires a fair comparison between domestic and export prices will not require any changes in Canadian law. However, Revenue Canada's questionnaire will become more detailed and the narrative must expand in order to properly explain the requirements.

**Comparison of Detail**

9. The initial requests for information from Commerce appear to be much more extensive than Revenue Canada's.[7] This may be due in part to the very structured and mechanical Commerce approach as opposed to Revenue Canada's more general approach. If Revenue Canada's questions are not adequately detailed, the questionnaire suggests a contact point in the Department. This does not provide comfort to exporters who may find they have answered the wrong question. They would benefit from more clarity with respect to the Department's requirements for product matching and costing information.

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5 In fact, voluntary responses were verified.

6 GATT Document ADP/19, (November 15, 1983).

7 Revenue Canada is not reluctant to seek and insist on the information they consider they require to detect and measure dumping. Theirs is not a superficial or a "lick and a promise" approach. The requirements of the revised SIMA and regulations require much more detailed and more computer-generated responses. One of the reasons for this is that Revenue Canada practice is approaching that of DOC.

10. In this connection, we compared the method of seeking information on cash discounts in the Revenue Canada and Commerce questionnaires.

11. Revenue Canada asks:

> "Where the importer in Canada has been offered a cash discount and has taken advantage of it, indicate the actual amount of the cash discount taken on every invoice/shipment to Canada and when it was taken (See Appendix 1)."

12. Commerce, on the other hand, suggests that the respondent examine CFR § 353.55 of the Department's regulations. There are two pages of single spaced text describing how to identify discounts and further instructions on how to situate them in the spreadsheet.

13. Commerce's requirements are quite explicit and appear to leave little room for doubt about what the Department requires. Commerce tries to anticipate situations where further guidance may be required and suggests where it may be obtained. However, it appears that at times they change their information demands in mid-stream. A report by Commerce's office of the Inspector General (OIG) indicates, however, that the Commerce approach creates problems. The OIG performance audit concludes:

> "IA (Import Administration) occasionally developed and applied policies that made reporting more onerous for respondents, caused confusion among analysts, and made IA's decisions appear arbitrary, even to its own staff.[8]

14. A number of the problems highlighted in the Inspector General's report are listed below:

- The rules about accepting new information were changed in December 1992 - the decision was communicated in an ambiguous letter that confused analysts. Some accepted new information before a deadline, others did not. The Inspector General notes:

  > "When IA rejected new information from a respondent, the end result was sometimes a high duty based on the best information available. Conversely, when IA accepted the new information, some respondents were in a much stronger position to obtain a more favourable rate determination."[9]

- by issuing new instructions that deviated from past practice, without explanation after the response to the questionnaire was received, IA is invited criticism that its actions were untimely and arbitrary.

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[8] OIG Report, 20.

[9] *Ibid.*

15. In the flat-rolled steel cases, Commerce required respondents to report all downstream sales (resales by related parties) through the first unrelated transaction. For many large steel companies, this represented a formidable task. One respondent compiled and reported hundreds of pages of data only to see IA ultimately decide to disregard it.[10]

16. In a review of *oil country tubular goods* (OCTG) from the USA, Revenue Canada, after verification, asked respondents to update domestic market pricing and costing information to a more recent 60-day period because a raw material price increase had been announced. The information was provided, but because of soft market conditions, the price increase was rescinded, meaning more work, without any impact on the results.

17. These examples involve both the heavy expenditures of human resources and the evolving complexity of information requirements, and establish the importance of looking beyond the texts of the requests for information issued by either investigating authority.

18. Much of the information that Revenue Canada does not specifically request in their original RFI may be sought by way of a supplementary RFI (Commerce may also do this) or more frequently at verification.

19. While Revenue Canada's SIMA Handbook suggests that investigators should provide respondents with an advance indication of areas/issues to be included in the verification, some investigators are not inclined to do so, preferring the surprise or ambush approach.[11] This approach requires respondents to provide substantial information, some of which must be generated specifically for the investigation, on the spot, in a very short period of time.

20. Commerce's Inspector General noted that the Commerce antidumping manual states "pro forma verification outlines have no utility to the verifier whatsoever". To be useful, the outline should be tailored to the respondent's response, following the verification report outline. The OIG examined 14 sales and cost verification outlines and found that with few exceptions, the outlines were mainly boilerplate for the steel industry in general.[12]

21. Boilerplate or not, these verification outlines are an agenda that should help to structure and expedite the verification by helping the respondent prepare and collect the necessary documents. I use Commerce outlines to prepare clients in Revenue Canada investigations for verification. They permit more effective management of the process which reduces the need for highly paid managers and executives to cool their heels waiting for their turn to respond to questions. Experience has

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[10] *Ibid.*, 21.

[11] SIMA Handbook, s. 4.5.3. Annex I to the WTO ADA provides in paragraph 7:

> "it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in light of information obtained."

[12] OIG Report, 8.

demonstrated that careful analysis can enable the respondent to minimize disruption of normal business. Indeed, Commerce requires that sales, accounting and other practices, be explained up front which is much more effective than piecemeal explanations whenever necessary through the investigation.

**Sampling of Exporter Respondents**

22. Revenue Canada normally sends questionnaires to all known exporters. If new exporters are discovered during the course of an investigation, Revenue Canada will try to include them. In the recent flat-rolled steel cases, Revenue Canada has adopted a sampling approach similar to the Commerce model described below.

23. Those designated to respond by Revenue Canada must do so and co-operate fully or they will receive the most punitive Best Information Available (BIA) rate. Non-designated companies may respond, if they wish, to Revenue Canada. In Canada, there is no guarantee voluntary respondents will be verified but in our experience, such replies have generally been verified and voluntary respondents have been assigned individual AD margins.

24. Commerce practice is to apply the weighted average margin for all firms investigated for whom margins were found to exist.[13] Negative margins are excluded but BIA margins were included prior to the URAA. Commerce now excludes BIA margins as a general rule.[14]

25. Canada applies the weighted average margin for verified designated firms to the non-responding non-designated firms. BIA margins were not included, pre-WTO. But Revenue Canada/SIMA have adopted the U.S. approach as codified in WTO ADA Article 5.8 which excludes zero or *de minimis* (less than 2 per cent of the export price) margins.[15] Commerce will usually examine at least 60 per

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[13] In CTM's, Commerce's Final Determination notes:

> "... Counsel for respondents who were not required to respond to the antidumping duty questionnaire oppose the Department's method of calculating the estimated dumping margin for "all other manufacturers" in this investigation.... It has consistently been the practice of the Department that in an affirmative determination, producers/exporters for whom a separate weighted-average dumping margin has not been calculated will fall into the "all other manufacturers category." The "all other manufacturer" dumping margin is the weighted-average margin of the companies investigated from whom margins were found to exist."

[See Fed. Reg. 45457, October 31, 1985.]

[14] 19 U.S.C.A. 1673d(5) A and B.

[15] "The margins of dumping for all exporters who shipped the subject good during the period of investigation were determined as follows:

- for imports from those exporters required to provide information who fully complied with the Department's Request for Information, the weighted average margin of dumping for a

cent (and at times up to 85 per cent) of the dollar volumes of exports to the USA during the period of investigation. DOC may exclude smaller traders from the process. Revenue Canada advises that it does not and will not exclude small traders who co-operate fully.[16]

26. The Commerce approach tended to result in higher margins for the up to 40% of firms in an investigation who may not be required to respond. However, Revenue Canada and Commerce practice with respect to "all others" rates are now consistent with Article 6.8 of the WTO ADA. However, in a normal investigation, Revenue Canada's approach of applying an extremely punitive BIA margin to all non-respondents (e.g., when they send questionnaires to all exporters) is much more trade restrictive, particularly to the smaller respondents who would not have been designated under the Commerce process (and Revenue Canada's approach to flat-rolled steel investigations).

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specific exporter was determined on the basis of the information supplied by that company;

- for imports from those exporters required to provide information but who failed to provide a complete response, the margin of dumping was based on the highest margin of dumping found for the final determination;
- for imports from exporters not required to provide information but who made a voluntary submission which was complete and analyzed by the Department, the weighted average margin of dumping was determined on the basis of the information supplied by that company;
- for imports from exporters not required to provide information but who made a voluntary submission that was incomplete, the margin of dumping was based on the highest margin of dumping found for the final determination;
- for imports from exporters not required to provide information and who did not make a submission, the margin of dumping was based on the weighted average margin of dumping determined for exporters in that country who were required to provide information and who fully complied with the Department's request; and
- for imports from exporters not required to provide information and where all selected exporters in that same country failed to provide a complete response, the margin of dumping was based on the weighted average margin of dumping for exporters in all other countries who were required to provide information and who fully complied with the Department's request."

Source: Revenue Canada, Customs and Excise, *Certain Cold-Rolled Steel Sheet Originating in or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America* (NQ-92-009), Final Determination, (June 29, 1993), 6.

[16] However, SIMA s. 30(3)2 envisages situations where it may not be practicable to verify all respondents.

**Cost of Production Information**

27. A particularly sensitive issue in both jurisdictions is the requirement to provide cost of production information. While Commerce demands for cost information are very detailed, Commerce does not always seek such information.[17]

28. Revenue Canada seeks and requires cost of production information for all products exported to Canada during the period of investigation as well as the relevant domestic model matches. This is because SIMA s. 16(2)b prohibits establishing normal value on home market sales that do not cover fully absorbed costs over a reasonable period of time. Revenue Canada will also use cost of production information to make quality and possibly quantitative adjustments to normal values pursuant to the relevant Special Import Regulations.

29. If a respondent does not complete Part D of Revenue Canada's questionnaire which requests detailed cost of production and financial information, they will not be verified and they will be subject to dumping margins developed using BIA. Revenue Canada's insistence on receiving cost of production information has caused a number of exporters to abandon the Canadian market rather than submit to demands that they reveal their cost data. This aspect of the SIMA, and Revenue Canada's administrative practice, can make the Canadian system more trade restrictive than the U.S. AD law and administration.

**Machine-Readable Response**

30. Commerce requires machine-readable responses to large portions of the questionnaire. Revenue Canada too has begun to seek responses on computer media but does not insist on this in every investigation. Commerce formats are more detailed and more extensive than Revenue Canada's but they seek similar information for the same purpose. Revenue Canada's are becoming more complex. The new reporting methodology to establish profitability requires incredible attention to detail.

31. Requiring computer-generated responses, particularly for the export and domestic sale printouts provided that the respondent has the data available on appropriate media, does not in my view, have a trade-distorting effect.[18] However, the nature of the information required may make the preparation and reconciliation of data more burdensome and costly particularly if extensive reformatting of existing data is required.[19] Failure to co-operate with Revenue Canada's demands is not a deterrent to receiving a ruling. However, it may not be possible for Revenue Canada to

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[17] Cost of production information is requested only when a petitioner makes a persuasive allegation of sales below cost 19 U.S.C.A. § 1677b(2)(a)(i).

[18] The growth of computerization makes these requirements less onerous. Indeed it is difficult to contemplate preparing domestic and export sales data responses without using a computer. Problem areas, however, arise when such replies are requested using different systems and software than the respondents use on a day-to-day basis.

[19] While adjusting data and formats is time consuming, having the exporters do this instead of the investigating authority may reduce the scope for unfavourable errors which may arise through the rounding effects of algebraic shortcuts.

complete its work in a timely and thorough manner. This may result in the P.D. estimate being higher than it would if there were more time for Revenue Canada staff to focus on their investigation.

32. In the Binational Panel Review of *Certain Machine Tufted Carpeting Originating in or exported from the United States of America*, the Panel, in addressing this issue, noted:

> "In an investigation such as this one, involving scores of producers and thousands of products and sales, it is reasonable for the Deputy Minister to require parties to produce data in computer medium and in a specific format, especially when such data is normally kept on computers, even if this requires some change in format and further computer analysis of the data by the party. Any respondent that resists complying with the Deputy Minister's reasonable requests for such data does so at its own peril."[20]

33. In GATT, concern about demands for information on computer media was raised most frequently by developing countries on behalf of exporters whose information systems are not sophisticated enough to comply with such demands. These concerns have been addressed by changes now reflected in the WTO ADA.[21]

**Model Matches**

**USA**

34. Commerce goes to great pains to ensure they are obtaining "apples to apples" price comparisons. Commerce provides detailed instructions on product concordance or model matches. In the steel cases, Commerce used standards adopted by the American Society for Testing and Materials (ASTM) and SAE International to verify the accuracy of various components of the model match concordance.

35. Investigators were expected to check mill certificates, as well as weight, length, thickness, finish, grade, tolerances and other important issues such as actual/theoretical weight differences, using shipping documents for this purpose.

**CANADA**

36. Revenue Canada normally leaves preparation of the concordance to respondents without much guidance. They then verify the accuracy of matches at verification. Problems can arise at

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[20] CDA-92-1904-02, Opinion and Panel Decision, (May 16, 1993), 38.

[21] See Annex II paragraph 2 to the WTO ADA, which states that a party should not maintain a request for response on computer media if the respondent does not have computerized records and compliance would entail unreasonable additional cost and trouble.

verification if Revenue Canada determines that respondent matching is unacceptable.[22] This causes duplication of effort and additional cost.

37. Revenue Canada normally performs the same checks as Commerce on physical properties (obviously based on documents rather than physically testing the steel). During the 1993/1994 corrosion-resistant steel sheet verifications, Revenue Canada focussed a great deal of attention on model matches, particularly gauges and coating thicknesses.

**Foreign Language Translation Requirements**

38. Commerce insists that respondents furnish submissions and key documents translated into English. Mexico in turn requires filings in Spanish. Canada will accept either English or French. Failure to translate important documents can result in mistakes or in Revenue Canada being unable to take the data into account at P.D.[23] They can usually do so by the F.D.

39. Requiring a response in the working language of the investigating officers is not unreasonable given the limited time frames required to assess, analyze and verify responses, and to calculate margins.

40. We expect that the burden of this requirement will become more obvious when Spanish, Portuguese, Korean or Japanese speaking countries require submissions that their investigators can readily work with. Mexican investigators have already begun this process. Neither Canadian nor American respondents enjoy the very significant translation cost or the problems of working in another language.

**Confidentiality Requirements**

**CANADA**

41. Rules about protection of confidential information are in SIMA s. 84(1). Generally, SIMA provides that a party providing information for purposes of SIMA may designate some or all of it to be confidential. But they must provide a proper non-confidential summary in sufficient detail to convey a reasonable understanding of the substance of the information, together with an explanation of why it should be held confidential.[24].

42. Revenue Canada permits more extensive protection of confidential information than Commerce. On the other hand, Revenue Canada has the authority to disclose this information but generally

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[22] For example, in the recent P.D. for *corrosion-resistant steel sheet* from Brazil, the Department rejected sales data that distinguished product by the nature of the packing. The preliminary deposit rate for Brazil was 126 per cent.

[23] The inability of the investigator to read Portuguese led to a substantial overstatement of preliminary dumping margins in *tillage tools* from Brazil.

[24] SIMA s. 85(1).

declines to do so. It is difficult for Revenue Canada to determine dumping within its tight statutory schedule. However, counsel do not have the same access as their counterparts in the USA. The Federal Court of Canada Trial Division noted:

> "Were I to find that the Deputy Minister was required to provide such confidential information on request [which the court did not do] I cannot avoid the conclusion that the whole legislative process would eventually come to a grinding halt, while every complainant requested the confidential information provided to the Deputy Minister in order to make their own calculations of normal value, export price and margin of dumping".[25]

43. Tribunal rules permit full disclosure of all confidential information to independent counsel acting for interested parties who have made a confidentiality undertaking.

**USA**

44. In general, Commerce practice requires disclosure of information that, if gathered and analyzed properly, may have some commercial intelligence value to the reader. Even the most confidential information is made available to counsel on their making a tightly drafted confidentiality undertaking (an Administrative Protective Order or APO). The Commission provides extensive access to confidential information, also under an APO.

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[25] Electrohome Ltd. and Deputy M.N.R., CER 11 at 42.

## XI. VERIFICATION

1. Verification of respondents' submissions by the investigating/administering authorities generates many complaints. These concerns are understandable. No businessperson appreciates the disruptions caused by government questions or audits. Their frustration and discontent is not lessened the investigators represent a foreign government who may be seen as collaborating with foreign competitors to deny access to an export market. We have seen no concrete evidence of such collusion but feelings of harassment may nurture such claims.

2. A rather extreme example of claims of political fixing is in an article by Kwon, Gi-Heon on the Hyundai case.[1] Professor Kwon put forward numerous claims which suggest little real knowledge of the case. While Professor Kwon's concerns may be based on hearing only one side of the case, the problems which Hyundai experienced were largely of their own making. Attached as Annex C is an article from the Canadian Competition Policy Record which reviews their experience with Revenue Canada at the Preliminary Determination.

3. Canadian Ministers do not pull strings to manipulate the Tribunal. Indeed, the Tribunal raised concerns about the complaint against Hyundai and evidence of injury in their preliminary injury assessment.[2] The Tribunal in the end found no injury.

4. Given the objective and purpose of antidumping legislation, the concerns of respondents must not be trivialized or dismissed. In order accurately to calculate dumping, the facts submitted to investigating authorities in Canada and in the USA must be verified. This is done to detect fraudulent or misleading responses, to prevent cherry picking of information, and to avoid issuing findings based on incomplete or inaccurate information. The verification process will often be an emotional and stressful experience for respondents; for many it is the only experience they have of being investigated by foreign government officials.

5. Commerce has a statutory obligation to verify all information submitted.[3] While Revenue Canada usually verifies all exporter responses; they are not required to do so and may choose not to.[4] Issuing a determination without verification is not normal practice and Revenue Canada is only likely to do so if the information in the response indicates a significant or high dumping margin.[5]

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1 Kwon Gi-Heon, Transnational Coalition Among Societal, State and International Actors: G.M., Ford and Hyundai in the Canadian Antidumping Case in the World Economy, Vol. 18, No. 6, (November 1996), 805.

2 *Hyundai* (CIT-13-87).

3 Commerce is required to verify all information used in the Final Determination. 19 U.S.C.A. § 1677 m(i).

4 See for example P.D. in *preformed fibreglass pipe insulation* where Revenue Canada estimated the margin for one exporter (who was related to the complainant) without verification. However, Revenue Canada did conduct a verification for the F.D.

5 Revenue Canada has been prepared to issue decisions in some SIMA s. 55 reviews without verification where they are satisfied the information is consistent with previous filings. This is perhaps due to budgetary constraints and the availability of information

6. The degree of disruption and consternation caused by the verification process will depend on the personalities, tact and approach of those conducting the inquisition. Investigators/verifiers are finders of fact. Human relations skills vary widely. Some investigators may possess few or none. Others will conduct verification in a very civil and efficient manner. For the respondent, there is always the stress of possibly failing verification - which can be intensified if the verification team chooses to mention this risk and the consequences at regular intervals. The WTO ADA requires that respondents be so advised in order to give them an opportunity to remedy any deficiencies.

7. The investigation process in both countries is more or less informal. Canadian antidumping investigators usually bring their own tools, e.g., staplers, etc. Commerce insists that such supplies be made available at the verification site. Commerce demands for support equipment are really not much different than those of Revenue Canada income tax auditors.[6]

8. Verification, in some ways, resembles a financial audit. The fact finders at times may not know what information they will require because they are uncertain about which methodology they will eventually use. This may result in their collecting more information than they would if they knew exactly how they intended to proceed.[7] Commerce may also collect additional information in anticipation of questions or criticism from respondents' counsel.

9. Uncertainty may be due to the complexity of the data or the need for further discussion about allocations which could render home market sales unprofitable. The most efficient methodology is to collect additional information to cover both possibilities. In other cases it may be due to an inadequate preparation or because the verification team's probing uncovers new information. Many problems could be eliminated through sufficient pre-verification preparation. However, this is difficult for Revenue Canada to do given the very tight legislative time frames in SIMA.

10. It is particularly frustrating in the Canadian system where verification teams often decline to discuss methodology, or more important, to agree on it with respondents or their counsel before the P.D.[8]

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from the F.D. Decisions not to verify are made only after the submissions have been thoroughly examined and subjected to requests for additional information. This approach has been selective and is not "telegraphed" in advance to respondents nor their counsel. Given the proximity in time of the SIMA s. 55 review to the original investigation and the uncertainty about whether or not Revenue Canada will actually verify, this process does not appear to dilute the effectiveness of Canadian administration.

[6] For example, calculators with tape, staplers, and access to a photocopier. In one investigation in India, the Commerce team requested the photocopier to be moved into the verification room. The Inspector General of the Department of Commerce would no doubt approve.

[7] While advance analysis will usually point them in the proper direction, they may find during the verification that a different approach must be used.

[8] We understand from our contacts with investigators that this is due in large part to the review of their recommendations by several layers of management, and the need to ensure that they do not prejudge the reactions of their superiors.

11. Some verifiers will take extra time to verify a response when it appears there will be a no-dumping or negligible-dumping result.[9] If the verification team does not find dumping, they will be required to explain why. This is understandable, as the Department has been persuaded of the existence of dumping before initiating the investigation. The additional effort is worthwhile to the respondent, as a no-dumping finding in Canada will, in certain circumstances, lead to an end of the process.[10] However, no or negligible dumping by a few firms does not lead to termination in Canada if the dumping of all other firms in the aggregate have engaged in dumping that is more than negligible.[11] Firms with no or *de minimis* dumping will continue to be included in the ongoing investigation.

12. In multi-company investigations by Revenue Canada, it is more difficult to secure termination on grounds of no dumping if other exporters in the designated sample are dumping. Further, punitive margins of dumping are assigned to designated respondents who choose not to respond. There are differences between Canadian investigations and U.S. investigations - indeed, Commerce will, as noted above, exclude non-dumpers. In addressing *de minimis* termination, the SIMA deals with dumping from countries. This fails to recognize that some companies may dump, countries do not.

13. On-site verification can be lengthy. Revenue Canada verifications are normally five days - but these can be very long days, sometimes 12 to 14 hours or more, with work continuing over lunch and verifications at time running to midnight or later. Respondents with experience in both systems claim that both are difficult to cope with. However, while they are concerned about the volume of information requested by the Commerce, they also find the U.S. questionnaire explanations and pre-verification check lists enable them to prepare better and have fewer disruptions of their normal business.[12] Under the more intuitive Revenue Canada approach, there may be no advance indication of the focus or priorities of the verification team. It is difficult to schedule exporter personnel in fixed time slots. This makes it essential for counsel to conduct a pre-verification during preparation of the response, and usually prior to the verification visit.[13] This adds appreciably to the cost of compliance and to disruption of normal business operations but should deliver more accurate results.

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9 For example, in *spandex yarn* from Korea, Revenue Canada reported that the investigation was terminated because of low volumes of dumped goods and low margins of dumping.

10 Where the non-dumping firm is the sole exporter from a country (e.g., *spandex yarn from the Republic of Korea, polyester filament yarn from Mexico*) or where they are the dominant exporter (*polyester filament fabrics from the USA*), the investigation will be terminated.

11 In *cold-rolled steel sheet from the USA* (NQ-92-009), three U.S. respondents had nil margins. Another had a margin less than 1 per cent. The investigation continued and the Tribunal found injury and the non-dumping or *de minimis* exporters continue to be subject to the finding. A similar situation occurred in *ladies leather footwear* (NQ-89-003) from Brazil.

12 I use certain elements of the Commerce questionnaire (modified for SIMA) to prepare foreign clients for verification. This is an efficient way to proceed.

13 This is also essential under the U.S. system.

14. Commerce's antidumping manual states that the analyst should "for the average case allow 5 working days for a verification". These teams often include four people. Revenue Canada also envisages five days - but it would be very rare for Revenue Canada to field a team of more than two persons, except where there is a combined AD/CVD verification, when there could be a three-person team.

15. A performance audit of Import Administration by the Commerce Department's Inspector General's suggests that language and accounting system differences may lengthen the verification process. The Inspector General's reported with respect to verifications in Brazil:

> "We observed a verification team of four (including legal counsel) spend 26 staff days to verify a company with xxx in exports and one product under review. Meanwhile, a company in Korea of a comparable size and complexity was verified by two individuals for a total of 10 staff days."[14]

> "At a second verification observed in Brazil... five individuals spent 45 staff days reviewing a company with xxx in exports and three products under review. In contrast, a Canadian steel manufacturer with exports of xxx and three products under review, was verified by 4 analysts over 22 staff days, 23 days fewer than the smaller company."[15]

16. The staff days for Revenue Canada investigations of U.S. firms ranged from about 7 to 10 per product, with some very long days.[16] Verification at British Steel ranged from 6 to 8 staff days per product. On a single product verification in Brazil, two Revenue Canada officers completed the verification in 10 staff days; however, counsel to the Brazilian exporter advises that the verification team spent a minimum of 12 hours per day on the verification. The first day started at 9:00 a.m. and finished at midnight.[17]

17. Revenue Canada's staff time is not directly comparable to the Commerce verification in Brazil as Revenue Canada conducted separate investigations for each of the four flat-rolled products at issue. It should be recognized that the two-person Revenue Canada teams required less time on some of the later product investigations because they had become familiar with the boilerplate (10Ks, 10Qs and annual reports) the accounting systems at respondent mills as well as procedures and documentation on their earlier visits.

18. Verification is very bothersome to respondents. Commerce requires more information in response to the official questionnaire - but Canadian investigators typically collect significant

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[14] OIG Report, 10.

[15] *Ibid.*, 11.

[16] Revenue Canada conducted four separate verifications while Commerce investigated up to four separate flat-rolled products at the same time.

[17] Information about the staffing requirements of Canadian investigations was obtained from counsel to respondents.

volumes of information during their verification visits.[18] Commerce may require some of this information with the response.[19] The respondent must provide this information promptly to Revenue Canada on the spot. Revenue Canada's initial Request for Information is becoming more extensive and more detailed.

19. Verification requires detailed tracking of sales, expense and costing information from cost statements back to financial statements, through ledgers, journals and source documents. In a steel investigation, Revenue Canada may use this process to test standard costs for say zinc, or electricity or local transportation. Costs at individual cost centres are tested and verified. This imposes significant time burdens on controllers, accountants and product specialists who are seldom under-occupied. They often have monthly reporting to complete within corporate deadlines - forcing them to work double or extended shifts to meet the often changing requirements of foreign inquisitors. This does not make the process any more enjoyable for respondents. There is little difference between Revenue Canada and Commerce in this regard.

20. It is difficult to argue that one country's verification teams are more trade inhibiting than another's. However, now that U.S. and Canadian exporters are becoming involved in the Mexican antidumping process, they have been exposed to yet another standard. Some, but not all, seem to prefer the U.S. and Canadian "devils" they know to those they are learning to know.[20]

21. A recent review of Commerce practice by the U.S. Inspector General suggests that U.S. verification teams are not doing as effective a job as they can:

> "Procedures used by the Import Administration to verify antidumping questionnaire responses do not go far enough to look for indications of inaccurate, deceptive or fraudulent responses. Weaknesses in the process have resulted because
>
> - testing procedures do not adequately establish the completeness of accuracy of the response,
>
> - IA's analysts do not have sufficient product knowledge to ensure a proper comparison of U.S. and foreign products,

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[18] Revenue Canada conducted four separate verifications while Commerce investigated up to four separate flat-rolled products at the same time.

[19] There are advantages to providing full back-up, even if not requested, because this can make the verification more efficient.

[20] Through the experience of additional activity and the changes that will be required to comply with NAFTA (procedural fairness, transparency and review mechanisms), the Mexican system should become more predictable and transparent. We have found officials of the Mexican Trade Office (SECOFI) in Ottawa to be assiduous observers of the Canadian system and eager to understand how it works. Our contacts with them suggest their Washington office has a similar approach.

- during the on-site verifications, analysts spent too much time reviewing background information rather than conducting tests,

- outside organizations that could provide valuable information about the respondents are not always consulted,

- IA's accountants lack adequate criteria for conducting verifications,

- resources required for verification are not allocated efficiently, and

- management lacks internal quality control checks of the adequacy of work performed by verification teams.

As a result, foreign companies may be able to evade paying millions of dollars in duties that they would otherwise owe. More importantly, petitioning American industries may not receive the full protection offered under the law from the dumping practices of offending foreign companies."[21]

22. Few, if any, respondents in U.S. investigations would agree with the Inspector General's conclusion that weaknesses in the Import Administration may enable foreign companies "to evade paying millions of dollars in duties that they would otherwise owe".[22] However, over the years, U.S. practitioners and officials have commented that the dumping margins determined by Revenue Canada in similar circumstances tended to be higher than those found by Commerce. There are several possible explanations for this situation, including differing circumstances of export sales to each market. However, this is a U.S. perception.

23. U.S. practitioners advise that the Inspector General's criticisms have limited application - and are specific to the investigations/verifications that were monitored. However, the observations are useful in helping to understand the concerns expressed by Canadian respondents and by U.S. counsel for respondents who have written extensively on these issues. Counsel for petitioners do not write as extensively on the subject, creating an imbalance in the public literature. The literature has been supplemented with research, experience and discussions with U.S. practitioners and administering authorities.[23]

24. The Inspector General's Report provides a useful overview of IA practices. It is also useful because it contains the responses of the Import Administration to the draft audit report, which are, in many cases, very persuasive. The Report also contains the comments of the Office of the Inspector General on IA's responses. The point that should be taken from the Inspector General's Audit is that there are important perceived deficiencies in the Import Administration's performance.

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[21] U.S. Department of Commerce, Office of Inspector General (OIG). *Import Administrations Investigations of Steel Industry Petitions*. Report No. TTD-5541-4-0001, (December, 1993), 4.

[22] *Ibid.*

[23] A meeting with two USITC Commissioners was included in the research background for this paper.

**Pre-Verification Questionnaires**

25. There are rules, or more accurately guidelines, in the WTO ADA about procedures for on-the-spot investigations.[24] These were not part of the Tokyo Round AD Code but they did emerge from deliberations of the AD Practices Committee established after the Tokyo Round. Including them in the ADA they should give them additional importance.

26. Revenue Canada's SIMA Handbook appears to treat seriously the requirements of paragraph 7 of the procedures, which requires *as standard practice* advance notification of issues to be verified so additional information can be prepared in a timely way. Revenue Canada verifiers do conduct several standard checks on randomly selected transactions in virtually every verification. Most verifiers are prepared, if requested, to provide counsel in advance of verification with a selection of transactions so that the documents and back-up information for these tests may be gathered in advance, saving time and reducing down-time during the verification process. Revenue Canada always reserves the right to select additional transactions during the visit but with the experience gained through advance preparation, the process will flow smoothly. And even the pre-selected transactions are subject to further audit, tracking to source documents and verification through financial statements, accounting ledger and journal entries and in many cases vouchers and invoices.

27. Commerce investigators do this but U.S. practitioners, including David Palmeter note:

> "... some analysts prepare and send the company detailed outlines of what they wish to review at verification, and these help the company prepare for verification. But other analysts provide only the most general outlines."[25]

28. Revenue Canada's compliance with the WTO ADA guidelines about pre-verification questionnaires is not frequent but is welcome when they do.[26] Advance indications of areas of focus provided by Revenue Canada tend to be limited. Much is left to the discretion and style preference of the individual verifier. If Canada reinforces its administrative practice to ensure all fact finders follow the rules for on-the-spot investigations, this will be an important change.[27]

29. Commerce which uses pre-verification questionnaires has much more time to prepare for verification than Revenue Canada does. Because of the tight 90-day limit on P.D. investigations,

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[24] WTO ADA Annex I.

[25] Palmeter, *The Antidumping Law: A Legal and Administrative Non-tariff Barrier* in *"Down in the Dumps: Administration of the Unfair Trade Laws,* Richard Boltuck and Robert E. Litan, Editors, The Brookings Institution, Washington, 1991, 93.

[26] OIG Report, 8.

[27] It is not clear whether this will make Revenue Canada more or less effective in detecting and measuring dumping. It will enable them to improve their prospects of obtaining what they require in a timely way and minimizing "down-time" during the verification process while respondents, staff rush to comply with last-minute requests for information.

translation requirements, and the Department's policy of extensions only in unusual situations, Revenue Canada's sleuths may be conducting verification in an exporter's premises 7-14 days after receiving the response. The more companies in the verification sample, the less time there will be to prepare advance questions and directions as to areas of focus.[28]

30. Commerce's Inspector General notes that in the steel cases, one trade lawyer described verifications as often "deeply superficial" exercises with IA'S limited resources over-matched by those of a large multinational corporation.[29] This is not a view nor a concern that experience suggests would apply to Revenue Canada's activities - perhaps because Revenue Canada requests at verification some of the documentation that Commerce requires in advance. Firms which have been through Commerce verifications may well consider the IG's observations sell Commerce verification short.

31. Commerce, like Revenue Canada, conducts "surplus sales tests". There is limited time provided to conduct and pass the tests. Their Inspector General noted:

> "the respondent was given from Monday to Wednesday to provide the required documentation. We believe that the efficacy of the test is diminished if the respondent is given so much time to provide the information. This gives respondents sufficient time to fabricate information and defeat the purpose of IA's tests. IA should establish short-term rigid deadlines for data collection".[30]

32. The Inspector General's comments reflect the rigidities of the Commerce procedures. When verification teams attempt to be reasonable, they are criticized. There are limits to what respondents can/will do to maintain market access. As noted earlier, some firms already decline to comply with Commerce demands. If more follow, the system could fall into disrepute and there will be strains on the WTO system.

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[28] In investigations like *ladies leather footwear from Brazil*, which had numerous (more than 60) Brazilian respondents to AD/CVD questionnaires and several other countries involved in the investigation, there would be difficult to provide advance notice. Nonetheless, general guidelines were established between the verifiers and counsel to the Government of Brazil and the exporters to permit the verification of the massive submissions amounting to well over 100,000 pages for dumping submissions alone in the limited time available (which was extended to 135 days).

[29] OIG Report, 12.

[30] *Ibid.*, 6.

**Post-verification Process**

33. At verification, Revenue Canada investigators will not engage in discussions about how they will treat certain issues or transactions. Their objective is to test the information submitted and to collect evidence to support their verification report.[31] While they will receive representations and arguments about interpretation before P.D. they will generally not advise whether or not these will be taken into account. Once again the real reason appears to be lack of time to engage in debate on the issues.

34. Revenue Canada will receive written arguments from respondents or counsel after verification. These must be provided in a timely way if they are to be taken into account for P.D. This again is due to the very short period of time available to Revenue Canada. If new documentation or explanations are offered after verification, Revenue Canada may decline to take the information into account at P.D. because they have not been able to verify it. However, they will take it into account for the F.D.

35. Counsel for petitioners in Canada do not have access to the confidential information filed by respondents.[32] This contrasts with the very liberal access granted to counsel by Commerce under their Administrative Protective Order (APO) system. In the USA, counsel for petitioners can and do challenge the accuracy of respondents' submissions, and can argue about how the information should be treated and how the law should be interpreted.

36. Counsel in Canada have limited ability to "assist" (second-guess) Revenue Canada or to argue for particular approaches. But counsel to petitioners who have researched the markets and who understand the marketing approaches and financial situation of their targets can have meaningful input into the process. Lack of access to this information limits their ability to pursue the issues with all the vigour their clients may desire.[33]

37. Both Revenue Canada and Commerce provide detailed disclosure of P.D. calculations to respondents. Commerce also provides disclosure to counsel for petitioners - the Commerce process is much more informative to petitioners' counsel than the limited disclosure that Revenue Canada provides them.

38. Revenue Canada will accept additional detailed submissions and information from respondents between P.D. and F.D. Indeed, with respect to areas of uncertainty, they may issue supplementary

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[31] This report is not available to interested parties.

[32] Revenue Canada has the statutory authority to make such disclosure but as a matter of practice does not.

[33] In the small motors case (1985), counsel for petitioners, basing arguments on a study prepared by a Brazilian law firm, challenged a non-confidential response that suggested that price controls had not impacted domestic prices in Brazil. The detailed confidential information demonstrated the accuracy of this statement. The A.D.M. Revenue Canada convened a joint meeting of counsel for both parties and representatives of the complainant and the Embassy of the Federative Republic of Brazil to discuss the issues - which were clarified to their mutual satisfaction. But such examples are rare.

requests for information. Response to these supplementary requests may or may not be verified at the discretion of the Department. Arguments will be addressed in meetings between counsel and the Department but Revenue Canada is unlikely to signal their acceptance or rejection of specific arguments before the F.D.

39. Verification of information filed by respondents occurs at a later stage in the process in the USA than in Canada. If Commerce believes a respondent has failed verification in whole or in part, they must notify counsel who will have an opportunity to prepare arguments on the subject. Revenue Canada, relying on the Deputy Minister's ability to estimate at P.D., may decline to take certain information into account for P.D. and will undertake to address it for F.D., usually after further clarification. This may or may not result in application of BIA margins. As Commerce verification takes place between P.D. and F.D., there is no substantial difference.

40. The Commerce investigation/verification involves an opportunity for both petitioners and respondents to comment on submissions and verification reports. There may be conferences involving both parties with pre-hearing and post-hearing briefs and a record. These result in very detailed analysis in the F.D. on each and every issue raised. While respondents may disagree with the results and question the objectivity of Commerce, there is a greater openness and transparency. However, Commerce does not always listen to respondents. Indeed, Binational Panels have reversed Commerce and accepted petitioners' arguments.[34]

**Costs**

41. Consultations with clients involved in investigations in Canada and the USA and discussions with U.S. counsel indicate Commerce's procedures are more expensive than Revenue Canada's. However, the U.S. market is much larger (generally 10 to 12 times larger than the Canadian) and the cost of compliance per dollar of exports is usually spread over a larger volume.

42. Petitioners too must be concerned about the cost of pursuing complaints. While complainants have less direct involvement in the Canadian investigation/verification process than petitioners in the USA, they also incur less cost at the early stages of the process. The issue becomes a trade-off between costs and their ability to guide the process - or to second-guess the investigating authority.[35] Once again, a valid measure of the need for second-guessing is the dumping margins found by the Canadian investigators.[36]

43. Canada and the USA approaches dumping from different philosophical and policy perspectives. This is partly cultural. While the U.S. system, particularly in the area of enforcement and

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[34] *Corrosion-resistant steel*, US-1904-03 (October 31, 1994).

[35] Costs for complainants in Canada tend to be more heavily weighted to the Tribunal inquiry.

[36] While there may be reasons to explain differences in margins between the two systems, the size of the margin directly impacts the competitive position of the respondent, and they have valid reasons for concern if the margins determined are too low to make a difference.

administrative reviews is different, this does not make it more effective. The purpose of the antidumping law is to eliminate injury due to dumping. One must then assess whether the margins found by Revenue Canada serve that purpose. Comparing Canadian results with dumping margins determined by Commerce provides a measure of this. Revenue Canada's record leaves little to be desired.

**Termination in Lieu of Preliminary Determination**

44. The Deputy Minister, Revenue Canada may terminate an investigation when:

- dumping is negligible; or

- dumping is not considered to be causing or threatening material injury

rather than issuing a P.D.[37]

45. Termination on the basis of no injury has occurred infrequently, for example on:

- polyester filament fabrics from the USA (1982) (no dumping);
- spandex yarn from Korea (no dumping);
- polyester filament yarn from Mexico (no dumping);
- synthetic baler twine from Portugal (no dumping); and
- synthetic baler twine from the USA (no injury)[38].

46. In *synthetic baler twine from Portugal and the United States of America*, Revenue Canada thought it necessary or important to explain why the dumping margins that the Department estimated for Portugal at initiation had not been borne out by investigation.[39] Revenue Canada explained:

> "The dumping investigation was initiated based on normal values estimated by the complainant and by another independent source. In fact normal values were found as a result of the investigation were considerably lower. In this regard the exporters were found to be well established, efficient and financially sound companies. In addition, state of the art technology was used to produce synthetic baler twine and consequently labour costs were low. Raw materials which were sourced from independent suppliers, were

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37 In *OCTG from Austria* (USITC Publication 1679, 1985), the investigation with respect to Austria was terminated at F.D. (no dumping).

38 The Tribunal has since reversed the Deputy Minister on this decision. The matter has proceeded to a Preliminary Determination and to a Section 42 inquiry before the Tribunal. The Tribunal's reasons for over-turning the Deputy Minister can be found in RR-93-002 Statement of Reasons. The Tribunal after their inquiry issued an affirmative injury finding (NQ-93-003).

39 Revenue Canada, Statement of Reasons, Synthetic Baler Twine from Portugal and USA (NQ-93-003), (October 27, 1993), 9.

found to be lower cost than those estimated by the complainant. All of these factors contributed to a lower than anticipated normal value and an absence of dumping from Portugal."[40]

**Burden of Proof**

47. Respondents are responsible for providing the supporting evidence and argumentation required to support an adjustment. This is particularly important in dealing with Revenue Canada, who do not identify and explain adjustment possibilities as clearly as Commerce does. Revenue Canada requires detailed evidence to establish that cash discounts, rebates and deferred discounts are "generally granted"[41] in the domestic market of the exporting country before a favourable adjustment to normal value can be considered.

48. Respondents in antidumping proceedings may fail to provide Commerce with the necessary information to be entitled to a deduction from foreign market value (FMV) for certain circumstance-of-sales expenses. In such a scenario, Commerce simply denies the claimed adjustment pursuant to 19 C.F.R. § 353.54 (1991), because the respondent has failed to satisfy its burden of proof arising under that regulation to be entitled to the adjustment."[42]

49. Commerce questionnaires are more detailed and transparent than Revenue Canada's about the information required for adjustments, why the information is required and how it will be used.

**Penalties for Failure to Respond in Whole or in Part Best Information Available (BIA)**

50. Both Revenue Canada and Commerce will impose penalties for failure to respond at all or to essential portions of the questionnaire. The use of Best Information Available (BIA) has been envisaged since the first GATT AD Code, and while there are more specific cautions in the WTO ADA these are largely based on the understandings on the use of BIA reached by the GATT Antidumping Practices Committee on May 8, 1984.[43]

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[40] At initiation the Department had estimated a margin of dumping of 22 per cent for imports of subject goods from Portugal.

[41] The discount must be earned and taken by more than 50 per cent of domestic customers or no allowance is granted.

[42] John D. McInerney and Craig R. Giesze, T*he Best Information Available Rule: A Rule of Reasonable Adverse Inference*, The Commerce Department Speaks (1992), 347.

[43] GATT ADP/21.

51. The U.S. questionnaire indicates:

> "Answer all applicable questions accurately and punctually. Late response may compel us, because of strict time constraints to use the *best information available* from other sources in making a determination.[44]

52. BIA margins can be very selective and very punitive. Commerce reported in *ferrosilicon from Egypt*:

> "As BIA, we are assigning the highest margin among the margins in the petition, in accordance with the two-tiered BIA methodology under which the Department imposes the most adverse rate upon those respondents who refuse to cooperate or otherwise significantly impede the proceeding, and as outlined in the Final ..."[45]

53. The WTO ADA[46] recognizes that when respondents decline to co-operate in an investigation, or otherwise frustrate the process of the investigation, the investigating authority should be able to claim negative inference. Further, the ADA requires that secondary information be carefully analyzed.

54. The decision of the Binational Panel in the Commerce determination in *Pure Magnesium* offered the following perspective:

> "`Best information available' is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information."[47]

55. By way of illustration, the panel referred to *Rhone Poulenc v. United States*,[48] where Commerce had selected as BIA the highest prior cost margin from an earlier time period when it had an alternative to select lower margin data from a more recent time period. The Federal Circuit Court held that a permissable interpretation of the best information statute allowed Commerce to *presume* that the highest prior margin is the best information regarding current margins. The Court stated that the presumption

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44 Commerce questionnaire. OCTG Admin Review (Canada), (August 6, 1993), paragraph 13.

45 *Ferrosilicon From Egypt*, Investigation No. 731-TA-642 (Final), U.S. International Trade Commission, Publication 2688, (October 1993), 58 Fed. Reg. 48038, (September 14, 1993).

46 WTO ADA, Article 6.8 and Annex II, paragraph 1.

47 USA-92-1904-04, 11.

48 899 F.2d 1556 (Fed. Cir. 1984).

> "... reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less". (emphasis in original)

Therefore, Commerce's choice of data as BIA is only a presumption that can be rebutted by the respondent.[49]

56. Revenue Canada's normal approach is to base the BIA rate on the highest verified margin for any single transaction in the investigation. BIA can be removed only by provision of the required information. Revenue Canada BIA is designed to be an incentive to comply with Revenue Canada's demands.

57. There have been complaints about the use of BIA.

> "... There is evidence that the demands being placed on respondents are reaching intolerable levels. The administrative burden simply of furnishing the required information within the required time in the required form to the Department of Commerce has become very burdensome, and, therefore, respondents are being subject to determination made on the basis of the best information available."[50]

58. The Commerce questionnaire has become so complex that even sophisticated companies resist completing it. They apparently consider the risk of BIA so high that they are not prepared to expend the time and incur the expense to participate in a process that many exporters believe is skewed against them.[51]

59. In CTM's, Matsushita and Toshiba took this position. Commerce ruled:

> "Although two of the companies investigated chose not to respond or did not file a proper response to the Department's questionnaire, § 776(b) of the Act provides the Department with a basis for making a sale at less than fair value determination through the use of the best information available, in this case petitioner's data. Absent responses by these companies, it is reasonable for the Department to assume that the best information available is an "intelligent approximation" of the respondents' actual dumping margins."[52]

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[49] USA-92-1904-04, 11.

[50] Richard Boltuck and Robert E. Litan, Editors, *Down in the Dumps*, 70.

[51] When the system poses this degree of difficulty, one must wonder about whether it is not becoming a non-tariff barrier of equivalent effect to the antidumping duties.

[52] *Cellular Mobile Telephones and Subassemblies thereof from Japan*, Determination of the Commission in Investigation No. 731-TA-207 (Final), U.S. International Trade Commission, Publication 1786, (December 1985), Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, *Fed. Reg.*, 45457 50, (October 31, 1985), A-52., 50.

60. While Commerce's use of BIA has been supported by the courts, there have also been rebuffs to Commerce through the U.S. court system. The Federal Court Second Circuit warned ITA that it has not been given power [BIA] that can be used arbitrarily to bludgeon respondents.[53] Although the statutory language is rather broad on its face, the courts have imposed certain limitations upon Commerce's authority to rely upon BIA. In particular, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") declared in *Olympic Adhesives* that Commerce "has not been given power that can be `wielded' *arbitrarily* as an `informal club"'.

61. Specifically, the Federal Circuit in *Olympic Adhesives* stressed that the relevant statutory provisions "*clearly requires noncompliance with an information request*" before Commerce acquires the legal authority pursuant to the Tariff Act to invoke the BIA rule. The courts have interpreted "noncompliance" to include, *inter alia*,

1. a respondent's failure to provide complete information within the time limit established by the agency,

2. a respondent's failure to supply Commerce with the requested information in the format (*e.g.*, computer tapes) required by the agency, and

3. Commerce's inability to verify the information submitted in a respondent's questionnaire response.

62. Commerce can request respondents to supply only that information that actually exists. In *Olympic Adhesives*, for example, the Federal Circuit struck down Commerce's use of BIA, because the information requested by Commerce did not exist, and was not available from the respondents under any circumstances. The Federal Circuit also overturned Commerce's use of BIA in *U.H.F.C. v United States* for the same reason. Notwithstanding the Federal Circuit's rulings on *Olympic Adhesives* and *U.H.F.C.*, a respondent cannot claim an exception to the BIA rule simply by contending that it no longer is in possession of information that it once maintained in its financial records.[54] Once a respondent is subject to an antidumping or countervailing duty proceeding, the respondent has a legal duty to maintain the relevant information in its financial records until the conclusion of the administrative proceeding and any subsequent judicial proceeding.[55] Failure to comply with this duty will warrant the invocation of the BIA rule.[56]

63. In *Sulfanilic Acid from India*, Commerce sent questionnaires to seven companies who were identified as producers to determine who would be the appropriate recipients of the full antidumping questionnaire. Four companies indicated that they had no sales or exports during the period of

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53 *Olympic Adhesives v. United States*, 899 F2nd 1565 1572/1574 (Fed Cir 1990).

54 916 F.2d 689 (Fed. Cir. 1990)

55 *See Koyo Seiko v. United States*, Slip Op. 92-72 (Ct. Int'l Trade June 17, 1992) (use of BIA upheld where respondent failed to maintain records from a current, though inordinately delayed, administrative proceeding).

56 *Ibid.*; *Timken Co. v. United States*, 630 F. Supp. 1327 (Ct. Int'l Trade 1986).

investigation. The remaining three companies did not respond to the questionnaire. In the absence of any response, Commerce had to base their determination on BIA.[57]

64. There are many reasons why the exporters might not have been able to respond - and the Commerce questionnaire provides phone numbers for the use of respondents in difficulty. There does not appear in the Commerce record evidence of any attempt to secure such assistance. BIA was the only alternative.

65. The courts have breathed certain procedural due process requirements into the statue. In particular, Commerce must satisfy the following conditions before acquiring the legal authority pursuant to the statute to resort to BIA.

- First, Commerce must specifically ask for the information through a "clear and adequate" communication.

- Second, if the submitted information is deficient in whole or in part, Commerce must specifically notify the respondent, through another "clear and adequate communication," that a deficiency exists.

- Third, Commerce then must afford the respondent a reasonable opportunity under the circumstances to correct the deficiency.

- Finally, Commerce must specifically forewarn the respondent that the failure to correct the deficiency will result in the agency's using BIA to establish the respondent's dumping margins or subsidy rates.[58]

66. In *OCTG from Canada*, Commerce explained how this policy had been implemented:

> "... Generally the Department will examine a respondent's questionnaire response to determine if it provides a reasonable amount of information upon which a determination can be made. Where such a response is clearly inadequate for such purposes, the Department disregards it and uses best information available. Where responses are deficient in certain areas, respondents are allowed the opportunity to clarify those areas. The Department will use best information available with regard to those areas where clarifications by respondents have not been adequate or timely enough to make an informed determination."[59]

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[57] *Final Determination of Sales at Less Than Fair Value:* 58, Fed. Reg. 3252, January 8, 1993.

[58] *Ibid.*, 335-339.

[59] *Antidumping; Oil Country Tubular Goods From Canada; Final Determination of Sales at Less Than Fair Value* 51 Fed. Reg. 15031, (Tuesday, April 22, 1986).

67. Commerce has addressed the relevant provisions of WTO ADA Article 1:8 and Annex II.[60] Commerce and the Commission are required to the extent practicable, corroborate the secondary information relied upon with independent sources that are reasonably at their disposal.[61] This should be a useful hedge against off the wall arbitrariness.

## CANADA

68. Revenue Canada spends little time on incomplete responses and/or unco-operative exporters. If a response does not include cost of production information or is incomplete in some other important way, Revenue Canada will reject it and establish dumping margins based on the best information available (BIA). The BIA levy in Canada is usually the highest dumping margin on any single transaction in the investigation. There are generally quite high and tend to bring trade to a grinding halt. The Canadian BIA approach can have a very chilling impact on trade.

69. WTO ADA Article 6.8 and Annex II which relate to the use of BIA are helpful. However, Canada has not amended SIMA nor the regulations to reflect these new provisions. Revenue Canada considers that their approach, still followed in *dry pasta* from Italy, merits WTO requirements. In *dry pasta*, the BIA rate was 100 per cent of the export price.[62]

70. Revenue Canada will use BIA if the Deputy Minister does not receive adequate co-operation or is not satisfied with the accuracy of the information received.

71. The general instructions for a Revenue Canada Request for Information state:

> "Failure to submit required information by parties requested to respond or to permit verification of any information may result in Customs basing its decision on the best information available at that time. Such a decision might be less favourable to your firm than if full and verified information was available."[63]

72. This caution is polite as Canadians would expect their Government's communications with foreigners to be. But their polite warning is an iron fist in a velvet glove. If Revenue Canada experiences inadequate co-operation or a refusal to respond, they will simply recommend that the Minister use his discretion[64] to establish a BIA that will "encourage co-operation".[65]

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60 19 U.S.C.A. § 1977e(a), (b) and (c).

61 19 U.S.C.A. § 1677e(c).

62 *Dry pasta from Italy* (CIT-5-86), Statement of Reasons, Preliminary Determination (P.D.) (January 28, 1987).

63 Revenue Canada Request for Information (Paragraph 16).

64 SIMA s. 29(1).

65 This is an historical approach. If exporters declined to co-operate under the 1904 Canadian law, they would be denied entry to the market.

73. Failure to provide a non-confidential version of a response will result in Revenue Canada declining to use the information received and basing their estimates on the best information available to them, which usually does not mean the information offered by petitioners.

**Practical Examples**

74. Commerce justifies using BIA whenever a party refuses or is unable to provide information in a timely manner or in the form required, or otherwise significantly impedes an investigation.[66] Commerce may also apply partial BIA, and decide on what BIA should be on a case-by-case basis.

75. In Commerce investigations of flat-rolled steel products from Canada, Commerce applied BIA or partial BIA to all Canadian respondents. Some examples are provided below with probable Revenue Canada reaction to each situation.

76. One Canadian exporter was charged with refusal to co-operate or being a significant impediment and received as BIA the highest margin in the petition for *plate* from Canada as amended July 14, 1992. The Canadian exporter advises they did not respond to the cost of production questionnaire in *plate* because a response would have required them to extensively restructure their cost and record-keeping system in order to comply. If Commerce practice were in line with Annex II:5, it might have been possible to submit data to the best of the exporters' ability and avoid BIA. However, failure to provide to Revenue Canada with costing information would attract BIA treatment. Revenue Canada would be more flexible on the format of the response.

77. In *OCTG from Canada*, Commerce reported in its Final (affirmative) Determination that:

> "... The information in the response reflected the form in which the company's accounting system compiles such data. Additionally, more detailed information was presented for one product, as an example of the specific costs included in the total amount. Under these circumstances, the Department concluded that the information presented in the response was reasonable."[67]

78. This approach was consistent with Annex II:5. Perhaps inconsistent application is part of the problem. This approach would be consistent with that generally employed by Revenue Canada.

79. If Revenue Canada does not receive information in time to verify it prior to P.D., they will estimate at P.D. based on BIA. They will also estimate on a modified BIA basis if they forget to obtain information on a particular issue, or if their post-verification analysis raises issues requiring further information and analysis. This occurred in Revenue Canada's investigation of *steel plate* and *hot-rolled sheet products*.

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66 Tariff Act of 1930 § 776(c).

67 *Antidumping; Oil Country Tubular Goods From Canada; Final Determination of Sales at Less Than Fair Value*, Tuesday, April 22, 1986, 51 Fed. Reg. 15031.

80. A basic principle of the Commerce approach was explained as follows in *Brass Sheet and Strip from France*:

> "The Department cannot use selected portions of an incomplete home market response, as it would allow respondents to selectively submit data that would be to the respondent's benefit in the analysis of their home market selling practices."[68]

81. Unless the respondent refuses to supply information or had consciously and deliberately concealed sales (which may be difficult but not impossible to establish), Revenue Canada's approach would likely be to request the additional information be provide forthwith at the time the deficiency came to light. This might require considerable extra work, and it might also result in the P.D. being high to reflect the use of BIA. However, the respondent can pursue the matter further between the P.D. and F.D.

82. Dofasco did not provide constructed value data for hot-rolled sheet as well as some corrosion-resistant and cold-rolled sales where there was no home market sales match. Commerce relied on non-aberrational transaction rates, for these omissions which were

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|---|---|
| cold-rolled | 133.12 per cent |
| hot-rolled | 376.96 per cent |
| corrosion-resistant | 82.51 per cent |

83. If Revenue Canada drew the respondent's attention to such deficiencies and, notwithstanding a further opportunity for the respondent to provide information, the deficiency remained, Revenue Canada would have also used BIA rates for the transactions in question.

84. Ipsco also received partial BIA for certain hot-rolled sales because:

- seven products did not have actual period further manufacturing costs;
- Ipsco failed to report certain U.S. sales.

85. It is not clear why the respondent would be able to provide the required information for some products and not for others. Revenue Canada would normally try to remedy the deficiency and would only use BIA if the information were not forthcoming. Revenue Canada would, in other words, follow the four steps required of Commerce before applying BIA. In a situation where a respondent cannot provide the required information, Revenue Canada would use other information provided by the respondent or the best favourable information.

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[68] *Final Determination of Sales of Less Than Fair Value: Brass Sheet and Strip From France*, 52, 52 Fed. Reg. 815, Friday, January 9, 1987.

86. Assuming that Commerce followed its prescribed procedures in the flat-rolled steel investigations, Revenue Canada's treatment of deficiencies in the same circumstances would have been very similar.[69]

[69] The WTO ADA envisages additional disciplines on the use of BIA. Administering authorities will be expected to take account of what a respondent can reasonably provide. If faithfully adopted into national legislations and practice, these rules may simplify the process and reduce concerns about the problems of compliance under pain of BIA.

## XII. DETERMINING DUMPING

1. There are two essential conditions for imposing antidumping duties. First, it must be established that dumping is occurring because without dumping there is nothing to offset. If dumping is determined and measured then it must be demonstrated through positive evidence that the dumping is causing or is threatening material injury.[1]

2. The WTO ADA requires that:

> 2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[2]

3. If we accept the common view that dumping is selling for export at lower net prices than one sells in the home market, the measurement of dumping should be a relatively simple procedure. It would be necessary only to determine the home market price (A) and the export price (B) and compare the two at the same point in the transaction chain, after making adjustments for differences in terms and conditions of sale. But the process is not a simple one. In the contrary, it is quite complex.

4. Both Canadian and U.S. laws and administering authorities contemplate adjustments for differences in the conditions and terms of sales. Problems arise with how these adjustments are calculated and allowed under each system, and how different methodologies may lead to different results.[3] Complexities arise in how each administering authority makes appropriate allowances for

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[1] The CITT in *caps, jars and lids* (NQ-95-001) stated that they need only determine whether injury had been caused or was threatened. In their view, it was no longer necessary to rule on both past *and* future injury.

[2] WTO ADA Article 2:4. It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[3] Seventy years ago Viner explained that this was a complex problem:

> "The methods whereby dumping may be concealed so that a mere comparison of foreign market values and export prices will not reveal its occurrence, and the ways in which such a comparison may appear to

other differences affecting pure comparability and how they calculate and allocate costs under constructed value methodologies.

5. The WTO ADA permits other methods of establishing normal values when the domestic/export price comparison method (the primary method) may not lead to reliable results.[4] The primary method and the adjustments methodology employed in the USA and Canada are addressed first. The secondary methods including the increasingly important constructed value method, are addressed later in this chapter.

**Period of Investigation**

6. The ADA provides that profitability shall be determined over a reasonable period of time, normally a year but not less than six months.[5] This rule usually establishes the period of the original

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> disclose the existence of dumping whereas in reality dumping is not being practiced, are so numerous as to make it impracticable to attempt to define in an antidumping law with precision and certainty the circumstances which shall make imports subject to the dumping-duties, if it is desired to prevent evasion of the law through concealment of dumping and likewise to leave free from penalization imports which are only in appearance but not in reality being sold at dumping prices. The most satisfactory method of handling the problem is unquestionably to leave to the administrative officials a considerable measure of discretion in determining in each case whether dumping is being practiced, and if so to what extent, but subject to the general rule that dumping shall be interpreted to mean the sale for export at prices lower than foreign market values, and that in comparing prices proper allowance shall be made for differences in conditions and terms surrounding export as compared to domestic sales. A literal enforcement of the provisions of any of the laws in the first group would result in numerous instances in the penalization of spurious dumping and in failure to reach genuine dumping because concealed by either inadequate or excessive adjustments of export prices to the different conditions and terms surrounding export, as compared to domestic sales."
>
> (Source: Viner, *Dumping; a Problem in International Trade*, 281-282.)

[4] Article 2.2 of the WTO ADA provides:

> "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.

[5] WTO ADA Article 2.2.1., f.n. 4.

investigation, in both Canada and the USA. In administrative reviews, however, Revenue Canada tends to establish periods of investigation shorter than Commerce requires under their retrospective enforcement approach.

7. The period selected for review of home market sales can be very important in determining:

a) whether or not dumping has occurred; and
b) the degree or level of dumping.

8. This is an important element of AD administration. Revenue Canada's practice is flexible and responds quickly to market changes, particularly in the exporting country. There is no reason why the administering authority cannot adjust its approach if it detects or suspects an intensification of dumped competition. Similarly, if they detect dumping at the beginning of the period that declines or disappears any time, this should be reported.

9. When home market prices are rising and export market prices are declining, the chances of finding dumping increase. Counsel to respondents may suspect investigating authorities of setting investigation periods to maximize dumping findings or reflect a trend of increased dumping.[6] This does not mean the dumping margins are artificial.[7]

10. In the USA, investigation periods have been extended to take account of long term contracts.[8]

**CANADA**

11. Pre-WTO Revenue Canada generally used a 6-month period of investigation but at times, a longer or shorter period. Both Revenue Canada than Commerce to depart from normal review periods. Now both are bound by the ADA minima. Revenue Canada argued that where they departed from normal practice, they did so to enable them to cope with large volumes of imports (e.g., carpets) through a shorter period which still allowed them to obtain adequate information.[9]

12. Respondents in *carpets* had two complaints: (1) that Revenue Canada selected a 3-month period and (2) that this period coincided with the worst period for the U.S. industry in recent history. The Binational Panel reviewing this decision did not reject Revenue Canada's decision. In *gypsum*

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[6] In Canada, investigation periods were an issue in *gypsum board* (NQ-92-004), *carpets* (NQ-91-006), *beer* (NQ-91-002), *preformed fibreglass pipe insulation* (NQ-93-002).

[7] In one case where a binational panel required Revenue Canada to use a different longer period of investigation (*gypsum board*), the dumping margins actually increased. See Revenue Canada Statement of Reasons (February 15, 1994).

[8] *Certain Granite Products from Italy*, (53 FR 27187, July 19, 1988) and *Certain Forged Steel Crankshafts from the Federal Republic of Germany* (52 FR 28170, July 28, 1987 and for seasonality reasons in *Certain Fresh Cut Flowers from Colombia* (52 FR 6842, March 5, 1987).

[9] A 6-month period ending the month prior to initiation.

*board*, Revenue Canada also selected a shorter than normal period.[10] The Binational Panel in this case remanded this decision to Revenue Canada with instructions to use a longer period.[11] In *preformed pipe insulation*, Revenue Canada, after initially selecting a nine-month investigation period, decided after initiation, but before questionnaires were due, to extend the period of investigation by six months for a 15-month period of investigation (which includes a period when market prices in Canada continued to fall).

13. Respondents claimed in each of these cases that Revenue Canada had cherry-picked the investigation period in order to maximize the margin of dumping that would be determined.

14. In *Beer*, Revenue Canada reported:

> "In conducting the investigation, it was found that prices in the domestic market increased substantially in 1991, due in most part to an increase in the U.S. federal excise tax levied on beer sold domestically. As a result, the investigation period was expanded to include January 1 to March 31, 1991. All parties to the investigation were advised accordingly."[12]

**USA**

15. Commerce has normally used a 6-month period of investigation, which runs for five months before and one month after filing the complaint, but as noted above changed this approach to meet the specifics of particular investigations.

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[10] Article 6:10 of the WTO ADA permits more flexibility in the selection of the period of investigation. Article 6:10 states:

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

[11] However, using the longer period increased the weighted average dumping margin. It is essential to pre-calculating the implications of a winning argument.

[12] *Certain Beer Originating in or Exported from the United States, Preliminary Determination of Dumping*, Revenue Canada, Customs and Excise, (June 4, 1991), 7.

**Date of Sale**

16. The date of sale establishes the point of reference for comparison of export sales with home market sales and whether or not an export sale is subject to investigation. Determining the date of sale and the date for currency conversion may have an important impact on price comparisons, particularly in highly inflationary or price-volatile markets. Viner noted in this connection:

> "The date of exportation is a certain and readily ascertainable date, but the actual date of sale is a matter of record only to the participants in the transaction and can easily be kept secret. During a period of rising prices, it would be in the interest of the exporter and the importer of dumped goods, if they seek to conceal the fact of dumping in order to evade the dumping-penalty, to report the date of sale to the authorities as having been earlier than the true date. Conversely, during a period of falling prices, it would be to their interest to report the date of sale as having been later than the true date. The adoption by Great Britain and the United States of the date of sale method involves, therefore, the assumption of the difficult administrative problem of discovering the true date of sale."[13]

**CANADA**

17. In Canada, the date of sale is the date on which all terms and conditions relating to the sale are agreed. The date of sale normally establishes the rate for currency conversion under the SIMA.[14] However, in the absence of information as to the date of sales, the date of shipment will be used for purposes of currency conversion.[15] Where a sales of foreign currency on forward markets can be directly linked to an export sale to an importer in Canada, the rate of exchange used in the forward sale will be used.[16]

18. Commerce's rules on date of sale are similar to Revenue Canada's. In *Cellular Mobile Telephones*, Commerce used the point in the transaction where the basic terms of the contract were known and the price to be paid was determined. The date of sale was thus the date on which the agreed-upon price is confirmed.[17] In some cases, this was the date of invoicing.

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13 Viner, *Dumping:*, 277-278.

14 SIMR s. 44.

15 *Ibid.*, s. 45.

16 *Ibid.*, s. 44(2).

17 *Cellular Mobile Telephones and Subassemblies thereof from Japan*, 50 Fed. Reg. 45451, (October 31, 1985).

19. In an appeal involving *leather footwear* from Brazil, the Tribunal found that in the absence of other information, date of sale should be the date on which production commenced.[18]

20. Commerce requires that exchange rate fluctuations be lagged for 60 days if the exporter can demonstrate that they are adjusting prices to the new circumstance. This is only beneficial to the exporter if the value of the U.S. dollar is declining as compared to his local currency. In practice, we understand that the necessary information to benefit from this regulation is rarely provided to Commerce.

21. The rules about determining the date of sale are similar in both countries. There is little difference in impact. Revenue Canada now applies a similar standard to reflect the requirements of WTO ADA Article 2.4.1 with respect to forward sales.[19]

**Selection of Comparable Periods/Averaging**

22. Price comparisons between export and domestic sales must be made on a fair and equitable basis. Before the conclusion of the WTO ADA, both Revenue Canada and Commerce would compare individual transaction prices with weighted average normal values. Almost inevitably, a finding of dumping resulted because the weighted average includes values above and below the average.

23. Counsel for respondents in the USA have frequently claimed that Commerce's sale to weighted average methodology inflates dumping margins. However, depending on price and volume trends, this approach may benefit exporters. It is impossible when dealing with mathematical approaches to make a categorical judgement that they will always have the same effect. One U.S. practitioner claims that the skew is no more than 2 per cent (in absolute terms).[20] As Revenue Canada used the same methodology, the same criticism would apply. I am not confident that this averaging method which is still possible, and will be normal practice in Commerce administrative reviews is so benign.

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[18] Howmark vs. Department of National Revenue (AP-92-243).

[19] SIMR s. 44(2),

Article 2.4.1 states:

> "When the price comparison under this paragraph requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and, in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements during the period of investigation."

[20] Boltuck and Litan, *Down in the Dumps*, 332.

24. It would be more accurate to compare weighted average export prices with weighted average normal values and the WTO ADA now prescribes this as the preferred methodology.[21] U.S. law and regulations permit use of the price/weighted average methodology when export prices vary from customer to customer or region to region, sufficient to permit Commerce to conclude that targeted dumping is occurring.[22] Revenue Canada's principal methodology provides for a weighted average or transaction to transaction basis.[23] However, Revenue Canada has the same "targeted dumping" exception available to Commerce for reverting to the price to average basis.[24] Revenue Canada does not intend to have recourse to this "exception" other than on an exceptional basis.

**Adequacy of Domestic Sample**

25. Investigating authorities in both countries must ensure that they have an adequate base of home market sales for comparison purposes. This is done to avoid situations where prices may be kept artificially low in the home market because the industry in question is geared almost exclusively to export or particular products are sold to only a few customers at home to establish a low price.

**USA**

26. U.S. practice is to determine the home market inadequate for purposes of price comparisons if sales in the home market are less than 5 per cent of sales to the USA.[25]

27. This issue was addressed in the Binational Panel Report on *red raspberries*, where Commerce was remanded on the inadequacy of their finding that domestic sales were not adequate to use for determining foreign market (now normal value).[26]

**CANADA**

28. In its administrative practice, Revenue Canada may take account of this 5 per cent threshold. However, they tend to examine each case on its own merits. Their objective is to ensure that there is an adequate basis for comparison. Because Canada is a smaller market than the USA foreign exporters with thin domestic markets may find it easier to meet the WTO ADA test for Canada than for the USA.

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21 Article 2.4.2.

22 19 U.S.C.A. § 1677 f-1(d)B.

23 SIMA s. 30.2(1).

24 *Ibid.*, s. 30.2(2).

25 19 C.F.R. § 351.402. See also WTO ADA, Article 2.2, which confirms Canadian and U.S. practice.

26 USA-89-1904-01 (December 15, 1989).

29. The principal difference between Canadian and U.S. practice is that once it is established there are inadequate home market sales of subject goods, Commerce is prepared to examine sales to third countries as a basis for establishing normal values. Canada seldom does so, indeed tries to avoid this option as a matter of policy. Revenue Canada appears to suspects there may be dumping occurring in third markets and considers the approach to be unreliable.

30. Revenue Canada is more comfortable with constructed value methodology when domestic export price comparisons are deemed unreliable. Constructed value calculations tend to be disadvantageous in relatively closed markets or where other vendors selling for consumption on the home market may be earning significant net profits before tax.

**Limitations on the Use of Home Market Sales**

31. SIMA requires Revenue Canada to base normal values on sales to more than one unrelated purchaser in the country of export.[27] So while an exporter may have sales of 10 discrete products to 10 customers, if each of those products is being sold only to a single home market customer, Revenue Canada would determine that the available domestic sales data did not provide an adequate basis for establishing normal values under s. 15 - and will shift the exporter into alternate methodology, most likely constructed value.

32. This approach is designed to reduce the possibility that accommodation sales will be made in the home market to conceal dumping. However, this rule also applies, for example, when substantial volumes of a product are sold only to a single large customer in the country of export and the same product is exported to the home market customer's affiliate or subsidiary in Canada, usually at the direction of the U.S. company.

33. In this situation, the exporter will have sold his product for home consumption and for export to Canada at an identical price. However, he cannot use the price of his home market sales as a basis for establishing normal values to Canada unless it is justified under constructed value methodology. Indeed, if profits in the exporting country are lower than on sales to the single customer, constructed values may result in lower dumping margins than under the price/price comparisons.

34. SIMA's restrictive interpretation of qualified sales does not appear to be required by the WTO ADA. It is more difficult for an exporter to Canada to justify its pricing by reference to their sales experience with like goods in their domestic market. This increases the complexity of the process and makes more difficult and uncertain the determination as to whether a particular export price does or does not constitute dumping.

35. Commerce does not appear to impose the same restrictions on single sales but the Import Administration administrative practices manual provides extensive guidance on what is or is not in the ordinary course of trade.

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[27] SIMA s. 16(2)a requires sales to more than one domestic customer.

**Arm's Length Transactions**

36. Administering authorities generally are very suspicious of home market sales that are not made at arm's length, subject to the normal forces of supply and demand. Dealing with related party transactions has become a principal focus of antidumping administrators and investigators.

37. Related parties may or may not make transactions at market prices. There may be a tendency among related firms to offer preferential pricing, or to transfer product on the basis of cost or cost plus a fixed mark-up. There is a presumption that transactions between related parties are an unreliable basis for establishing normal or foreign market values.

38. Indeed, one of the principal reasons for increased complexity in antidumping systems is the growing importance of transnational corporations in international trade. The insistence of taxation authorities on proper transfer pricing among related companies further complicates the situation. The complexity of these interrelationships is found in an article published by Commerce staff, where they illustrate their concerns with the following example:[28]

> "It is fairly common for foreign respondents to purchase from related affiliates a variety of services (*e.g.*, packing, transportation, insurance, and warranty) that facilitate the production and sale of the subject merchandise. In calculating dumping margins, however, the Department must be very conscious of the potential distortion involved in transactions between related parties. Accordingly, in evaluating a respondent's claim for sales adjustments involving related parties, the Department generally considers the following factors. First, the Department considers whether the transfer price paid represents an actual expense to the entity responding to the questionnaire, or, merely an intracorporate transfer of funds. Second, the Department evaluates whether the transfer prices paid for these services were at arm's length. If either of these factors fails, the Department will disallow the claimed adjustment.[29]
>
> In *Final Results of Antidumping Duty Administrative Review; Color Picture Tubes From Japan*, for example, the Department found that respondent's related party charges it more for freight than the related party is charged by the trucking company that actually delivers the merchandise. Thus, the Department disallowed the mark-up charged to respondent because the mark-up represents an intra-corporate transfer of funds and not an actual expense."[30]

39. Administering authorities in both countries must be and are alert to the complexities of intra-group transactions.

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[28] *Ibid.*, 17.

[29] Recent Trends in the Department's Handling of Related Parties. McDevitt, Ringel, Terpstra. *The Commerce Department Speaks* (October 1, 1992), 2.

[30] *Ibid.*

**CANADA**

40. Revenue Canada and Commerce both require that home market sales be made at arm's length in order to use them in domestic/export price comparison.

41. SIMA does not permit Revenue Canada to take account of home market sales to related parties in calculating normal values.[31] The relationships that result in parties being related are quite extensive. Canada assumes that all sales between firms so related are not at arm's length. They must be rejected, narrowing the domestic sales base available for comparison with export sales. There is little in Revenue Canada's reasons about treatment of related party sales because SIMA prohibits using them to establish normal values.

42. SIMA s. 2(2) and 2(3) provide the following definition of "associated persons". These definitions are reproduced in every Revenue Canada antidumping questionnaire.

> "(2) For purposes of this Act, the following persons are "associated persons" or persons associated with each other, namely,
>
> (a) persons related to each other; or
>
> (b) persons not related to each other, but not dealing with each other at arm's length.
>
> (3) For the purposes of subsection (2), persons are related to each other if
>
> (a) they are individuals connected by blood relationship, marriage or adoption within the meaning of subsection 251(6) of the *Income Tax Act*;
>
> (b) one is an officer or director of the other;
>
> (c) each such person is an officer or director of the same two corporations, associations, partnerships or other organizations;
>
> (d) they are partners;
>
> (e) one is the employer of the other;
>
> (f) they directly or indirectly control or are controlled by the same person;
>
> (g) one directly or indirectly controls or is controlled by the other;
>
> (h) any other person directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of each such person; or
>
> (i) one directly or indirectly owns, holds or controls five per cent or more of the outstanding voting stock or shares of the other."

43. SIMA s. 2(4) notes that whether or not two parties are operating at arm's length is a matter of fact.

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[31] SIMA s. 15(a)1.

**USA**

44. Commerce will take account of sales between related parties but only if the Secretary is satisfied that the price is comparable to the price at which the exporter sold "such or similar merchandise" to unrelated purchasers.[32]

45. Commerce practice may be described as follows:

> "In determining whether related party transactions are made at arm's length prices, the Department generally compares the reported prices between related parties with established prices between unrelated parties .... It, however, is incumbent on the respondent to demonstrate through a detailed analysis that related party sales are at arm's length ..."[33]

46. In *Final Determination of Sales at Less Than Fair Value: New Minivans From Japan*,[34] Commerce determined that respondents also carry the burden to demonstrate when transactions are not at arm's length, when it is to respondents' benefit that the profit remain in the export sale price calculation. The Department justified its inclusion of intracorporate profit in the movement expense calculation based upon the fact that arm's length prices typically would include cost plus a reasonable profit.[35]

47. There is statutory language and a definition in the Commerce questionnaire. Commerce also considers the guidance provided by U.S. Generally Accepted Accounting Principles (GAAP) in determining whether one party controls another. U.S. GAAP states that:

> "all investments must be consolidated if a parent company has a controlling financial interest represented by the direct or indirect ownership of a majority voting interest (50% or more)."[36]

48. It is Commerce practice that the transfer price of a major input (between related parties) must be greater than the cost of producing the input.[37] Revenue Canada's methodology is identical.

49. Commerce *requires* the respondent to report the supplier's actual cost to produce the input in lieu of reporting the transfer price if the two parties are under common control or if one party owns

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[32] 19 CFR Regulation 351.403.

[33] McDevitt, Ringel and Terpstra, 14.

[34] 57 Fed. Reg. 21937, 21944 (May 26, 1992).

[35] McDevitt, Ringel, Terpstra, 18-19.

[36] *Ibid.*, 21.

[37] *Ibid.*

more than 50% of the other. This approach recognizes the treatment employed by U.S. GAAP in reporting the effect of intercompany transactions.[38]

50. Commerce practice is illustrated in *Certain Granite Products from Spain*:

> "The administrative record establishes a close, intertwined relationship between Ingemar and Ingemarga based upon their joint ownership. Both Ingemar and Ingemarga are owned almost exclusively by the same individuals and share the same board of directors. Though only one transaction took place between Ingemar and Ingemarga during the period of investigation, these companies at times operate closely together. For example, Ingemar and Ingemarga share information on possible sales opportunities. Ingemar and Ingemarga are also billed jointly by outlets in the home market. Finally, the joint owners of Ingemar and Ingemarga have directed the day-to-day manufacturing process for each company by specifying which entity would import granite and which would use local quarries. Indeed, the production facilities at both companies consist of the same type of equipment so it would not be necessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities. The only difference between these commonly-owned companies is that one uses domestic granite and the other, foreign granite, as inputs. Given these facts, it would be incorrect to conclude that these entities constitute two separate manufacturers or exporters under the dumping law."[39]

**Sales in the Ordinary Course of Trade**

51. The WTO ADA permits administering authorities to reject home market sales at less than fully absorbed cost in determining normal value or foreign market value, on grounds that these are not in the ordinary course of trade. There are safeguards to prevent small volumes of less than cost sales during the period of investigation being rejected.[40] But the concept is not limited to sales at less than

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[38] *Ibid.*

[39] *Final Determination of Sales at Less Than Fair Value: Certain Granite Products From Spain*, 53 Fed. Reg. 24337, (June 28, 1988).

[40] See WTO ADA Article 2.2.1

> "2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

full cost. Indeed, businessmen would argue that sale at less than full cost are often in the ordinary course of trade.

52. Revenue Canada's approach is dictated by the requirement in SIMA s. 15(c) which stipulates that sales selected for the determination of normal value must be made in the ordinary course of trade for use in the country of export under competitive conditions.

53. The SIMA Handbook notes that:

> "In the ordinary course of trade means, in general, that goods are offered for sale to an individual customer on the same terms as they would be offered for sale to any other customers buying the same quantity, at the same trade level, with the same freight conditions, and so forth.
>
> The second factor `for use in the country of export' means that the goods must be used in the country of export and therefore sales of goods to domestic customers for export at a later date cannot be considered.
>
> The third factor `under competitive conditions' means that the transactions occur in a market where prices result from the free interplay of supply and demand."[41]

54. Revenue Canada investigators wish to ensure that sales used to establish normal values properly reflect the normal selling prices in the exporter's home market. Revenue Canada seldom rejected sales as not being in the normal course of trade unless they were disqualified:

a) because price controls were demonstrated to have affected the prices for home market sales. Then these sales would be excluded on grounds that competitive conditions do not exist. Revenue Canada has examined price controls in Brazil on several occasions and has not rejected sales of products subject to price controls because it was demonstrated that the price controls were guidelines that did not preclude competition, e.g., sales could be made above and below the guideline. Discussions with U.S. experts suggest Commerce would not disqualify such sales;[42]

b) because the sale formed part of a series of sales of goods at prices that do not recover in the normal course of trade and within a reasonable period of time, the cost of production, administration, and selling costs, and an amount for profit; Commerce practice parallels Revenue Canada's but constructed value investigations are not automatic. However, Revenue Canada must because of SIMA proscription against using below-cost sales;[43]

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41 SIMA Handbook, Section 5.2.

42 The argument is that the existence of price controls may artificially depress home market prices - and sales in these circumstances should not be taken into account to establish FMV or normal values. The existence of price controls alone should not impact on normal value calculations in Canada. However, Revenue Canada's SIMA Handbook urges special caution in these situations.

43 For purposes of SIMA s. 16(b), the amount for profit means, in reality, any profit.

c) because the sales were made to governments or government agencies.

55. In *beer from the USA* one of the respondents argued that their most comparable domestic sales were sales to the military. Because all branches of the miliary are considered to be sales to a single customer under the related parties rule, such sales could not be considered.[44] Nor does Revenue Canada consider sales to governments to be sales in the ordinary course of trade.

56. Revenue Canada explained:

> "The military sales for export may not be considered for purposes of determining normal value for reason that section 15(c) of SIMA requires that sales be in the ordinary course of trade for use in the country of export under competitive conditions. Sales for export and sales to government institutions, including the military, do not meet this condition."[45]

57. Revenue Canada considers home market sales of non-primes at less than full cost not to be in the normal course of trade. Revenue Canada is inclined to exclude sales of non-primes in the domestic market from consideration (particularly if they are sold at less than fully absorbed cost) but it does not exclude such sales from the export sales it examines in order to establish dumping.[46] For example, Revenue Canada holds that exports sales of non-primes must cover fully absorbed cost of production plus an amount for profit. Their approach would not take account of the reduced market value of this down-graded product. Their position is that the cost of producing a reject or a non-prime is the same as the cost of producing prime quality product. This approach ensures that Canadian producers have very effective protection from imports of other-than-prime quality materials.

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Regulation 11, which provides inter alia for a minimum profit of 8 per cent (in SIMR s. 11(b)(v)) does not apply to the expression cost of production except in SIMA s. 19(b) and 20(c)(ii).

44 SIMA s. 15. These sales would not have meet the requirement for sales to multiple customers.

45 Revenue Canada, Customs and Excise, *Certain Beer Originating in or Exported from the United States, Preliminary Determination of Dumping*, (June 4, 1991), 11.

46 There have been exceptions where "other than primes" have been excluded from the product definition. Recent examples are carbon steel plate and carbon steel hot-rolled sheet. Commerce's regulations provide more guidance about sales in the ordinary course of trade. The Secretary is required to consider the conditions and practices that for a reasonable period prior to the domestic sales used for fair value "have been normal in the trade of merchandise of the same class or kind in the home market country". 19 CFR 353,46(b)

**USA**

58. Commerce may in addressing the requirements related to "ordinary course of trade" exclude:

- sales of samples
- off quality merchandise
- closeouts
- trial sales
- very small volumes.

59. However, the Department did not exclude from normal value (f.m.v.) small volume sales to the exporters usual domestic commercial customers and where such sales were at the same level of trade as the U.S. purchases.[47]

**Sales at the Point of Direct Shipment**

60. Revenue Canada looks first to home market sales closest to the point of shipment to Canada.[48] This provision will be considered when zone pricing appears to be in effect. If there are not sufficient sales made at that point, they will expand their market focus. However, in practice this provision is generally ignored. Ex-factory prices tend to be higher for sales that are located closer to the factory. Some of the reasons for this could be that (a) there is less freight to absorb and (b) it is more difficult for distant competitors to compete even on a freight-equalized basis. These factors could result in a higher normal values in the plant area than the national average, where distance and competitive factors, such as the proximity of a competitor to distant customers, might reduce the ex-factory domestic price.[49]

61. In *beer*, a petitioner (Heileman):

> "... made representation that, should the Department conclude that Rainier brand beer sold in the United States and British Columbia are like goods, the Department should not look at sales in Washington state as being sales of like goods... contended that in Washington state, the Rainier brand receives significantly more promotional support than in other states and that as a result of the promotional support, the prices of Rainier products in Washington are higher."[50]

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47 *Brass Sheet and Strip from Japan*, 53 FR 23298, (June 21, 1988).

48 SIMA s. 15(e). See *OCTG casings* from the USA, *beer* from the USA.

49 Differing freight policies might influence this result.

50 Revenue Canada, Customs and Excise, *Certain Beer Originating in or Exported from the United States, Preliminary Determination of Dumping*, (June 4, 1991), 9.

62. The Department responded as follows:

> "In considering Heileman's request, the Department must be guided by section 17 of SIMA which requires that normal value be determined on the basis of the price of like goods, that price being the price at which the preponderance of like goods are sold.[51] In this instance, the Rainier brands in question were found to have been sold at preponderant prices in the state of Washington. The sales of Rainier products in Washington state exceeded that of all other sales of Rainier products, excluding the sale to Canada... In determining the normal values, the Department has considered the concern of Heileman that the Rainier products in Washington receive greater promotional support and as the legislation and regulations provide that an adjustment be made to reflect these differences, the selling prices of the Rainier products in Washington have been adjusted downwards."[52]

**USA**

63. There is no similar Commerce practice. As a practical matter, the Canadian provision is novel and seldom has an impact because export and domestic prices are normally compared on an ex-factory basis.

**Sales at a Less than Fully Absorbed Cost**

64. Article 2.2.1 and footnote 5 of the WTO ADA state that:

> "Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.
>
> _____
>
> 5 Sales below per unit cost are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average unit cost or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

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51 SIMA 17 refers to sales of like goods that comply with all terms and conditions referred to in s. 15 - including s. 15(c). The preponderant price concept is not included in the post-WTO SIMA.

52 Revenue Canada, Customs and Excise, *Certain Beer Originating in or Exported from the United States, Preliminary Determination of Dumping*, (June 4, 1991), 9.

65. Whether or not a respondent is selling below its cost of production has become a central issue in most antidumping proceedings.[53] Calculation of normal value based only on sales above cost raises the weighted average price and increases the likelihood that dumping will be found. If below cost sales are extensive enough, it may force the use of constructed value.

66. Article 2.2 of the WTO ADA establishes detailed rules for determining when home market sales below cost may be employed in establishing normal values. Revenue Canada's rules are roughly equivalent to Commerce's. The principal changes are that:

- SIMA (and the U.S. rules) now provide a reasonable period of time for assessing cost recovery - normally one year. This is more meaningful than the usual 6 month period of investigation previously conducted by Commerce, and investigations for periods as brief as 3 months by Revenue Canada. However, even with sampling techniques, the burden of compliance (and the cost) will be increased. If the period of investigation is extended to a year from six months, this doubles the respondents already onerous reporting burden.[54]

- The WTO ADA requires that the producer's/exporter's historical cost allocation methodology be respected and that generally accepted accounting principles in the country of export be accepted (Article 2.2.11). These provisions have not been reflected in the revised SIMA nor do the amended SIM Regulations make any reference to GAAP or allocation methodologies. Revenue Canada has been challenged at a Binational Panel for ignoring GAAP prior to the entry into force WTO ADA but was not remanded.[55]

Commerce is normally required to calculate costs based on the records of the exporter or producer, if such records are kept in accordance with the generally accepted accounting principles of the exporting or producing country and reasonably reflect the cost associated with the production and sale of the merchandise.[56]

67. The rules about cost of production determinations or constructed value methodology under the WTO ADA provide a more predictable environment. For example:

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[53] Canadian law as amended in 1921, provided that the foreign market value for the purposes of assessing both ordinary and dumping duties, shall in no case be less than the actual cost of production of similar goods plus a reasonable profit thereon, and thus made subject to the dumping duties goods sold for export to Canada at a price less than cost of production even though the goods were being sold for home consumption at a low price. Viner, J., *Dumping: A Problem in International Trade*, 291.

[54] David Palmeter, Report to UNCTAD, 7-8.

[55] *Cold-rolled steel sheet* CDA-93-1904-08, 49 and *corrosion-resistant steel sheet*, CDA-94-1904-3, 26, f.n. 35.

[56] Tariff Act of 1930 § 773 (f)(i).

- Article 2.2.1 provides more scope for accepting sales below cost at a point in time that are above weighted average cost for the period of investigation. If the period of investigation is short, this may not be of great significance.

- Article 2.1.1.1 may reduce the scope for arbitrarily rejecting or massaging costing or allocation methodology consistent with GAAP.

- There are new rules in 2.1.1.1 about start-up costs and non-recurring items that are already reflected to some degree in Commerce practice, and less so in Revenue Canada's. This rule, if adopted faithfully into domestic law, could result in less frequent recourse to constructed cost methodology. This is a potentially important change for high technology industries and capital intensive industries with extended and expensive learning curves.

68. Commerce seeks information to address potential sales below cost only in those cases where their existence is alleged by petitioners. It is possible for petitioners to make such allegations even after the initiation of the investigation normally up to 20 days after the respondents' filing on investigation. Commerce will automatically conduct cost investigations in subsequent administrative reviews if there has been a previous finding of sales below cost.[57]

69. In calculating normal value, Commerce may disregard sales that are made at less than cost of production. In order for an exporter to suffer this fate, Commerce's regulations require that sales below the cost of production are those that have been made over an extended period and in substantial quantities and are not at prices that permit recovery of all costs within a reasonable period in the normal course of trade.

70. Sales below cost in substantial quantities occur:

71. - sales at less than cost represent 20 per cent or more of the sales under consideration in determining normal values

or

- The weighted average permit price of the sales under consideration for the determination of normal value is less than their weighted average unit cost of production.[58]

**Adjustments to Primary Method**

72. The WTO ADA requires that:

> "Due allowance be made in each case on its merits for differences which affect price comparability, including differences in conditions of sale, including taxation, levels

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[57] 19 CFR § 353.31(c).

[58] 19 U.S.C.A. § 1677(b)(c).

> of trade, quantities, physical characteristics and any other differences which are also demonstrated to affect comparability".[59]

73. Since the early antidumping laws were introduced, it was recognized that adjustments must be made to reflect different terms and conditions of sale. However, relatively few adjustments were made by Revenue Canada before the Antidumping Act entered into force. During the debate on adjustment methodology in the Antidumping Act, before the Standing Committee on Finance, Trade and Economic Affairs, Rodney Grey explained:

> "The whole purpose of these allowances is to adjust the export transaction back to the same basis as the sale for home consumption in the country of export."[60]

74. Mr. Grey in further discussion of this issue commented that to go beyond the percentage of cost incurred in the country of export in granting adjustments "would be sanctioning dumping."[61] It has always been Canadian policy that while application of antidumping law would be limited to situations where the dumping was causing (or threatening) material injury to production in Canada, the law would be administered by Revenue Canada, as rigorously as in any other country.

75. There are differences between Revenue Canada and Commerce methodology in the calculation and granting of adjustments.

76. Revenue Canada will adjust for functions that are performed in the exporting country but not performed (at all) on exports to Canada. They will not compensate, under the trade level adjustment regulation, for functions that are incurred in both markets but are less costly for export sales.[62]

**Quantitative Differences**

77. The Administering authorities in both countries try to ensure that large volume home market sales are not used as a basis for establishing normal values for smaller export volumes. Exporters and importers, who may purchase in substantially larger volumes than are traditionally sold to individual home market customers, will not want their normal values to reflect the higher prices smaller quantities sold domestically might be expected to command.

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59 Article 2.4.

60 Grey Testimony to the Commons, 37.

61 *Ibid.*, 38.

62 SIMR s. 9(a).

**CANADA**

78. Revenue Canada will adjust for quantity differences if there is a discount generally granted for home market sales of like goods in substantially the same quantities as exported to Canada.[63] The quantity adjustment, either positive or negative, may also be based on a demonstrable difference in cost between the cost of producing the goods sold in the home market in substantially the same volume sold to Canada.[64]

79. In practice, generally granted means that such discounts must be granted on at least 50 per cent of home market sales. Revenue Canada can and does adjust prices upward to reflect smaller volumes sold to Canada when there is evidence of higher costs for shorter runs.

80. When using discount schedules, Revenue Canada will place the Canadian sale in the proper place in the discount schedule. Proof that the price list and discount schedules are respected is required. If discounts are not granted on home market sales, often enough to meet the 50% thresholds, Revenue Canada will take the net prices into account in their calculations - but the adjustment will be a weighted average of the actual discounts granted, not an adjustment for the full percentage adjustment which may be warranted by the published discount schedule.

**USA**

81. The Commerce questionnaire explains:

> "we will make reasonable allowances for differences in quantities sold between relevant markets if you can show that the amount of any price differential is wholly or partly due to such differences in the quantities sold".[65]

82. It appears that Commerce's standards are very vigorous. U.S. counsel we consulted indicated that Commerce normally denies claims for such adjustment. In *Operators for Jalousie and Awning Windows* from El Salvador, Commerce noted:

> "... The claimed adjustment was based on estimated costs savings, not on actual production experience. This estimate was based on an allocation of fixed costs between jalousie operators and other product lines. The resulting pool of costs was then allocated over theoretical increased volumes of production. The method of allocation does not reflect the effects of differing production levels of other products or differences in variable costs. In addition, respondent did not demonstrate that the production capacity for jalousie operators would permit the production levels used in its analysis either by trying it to actual experience or actual physical capacity. For the various reasons cited above, we determine that the estimate provided by

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63 *Ibid.*, s. 3.

64 *Ibid.*, s. 4.

65 U.S. Department of Commerce, *flat-rolled* questionnaire, App 4-2, point 1.

> respondent cannot be tied to actual costs differences for claimed differences in production levels and, therefore, this adjustment was not allowed."[66]

83. Commerce's standard is that if there is an allowance in more than 20 per cent of home market "such or similar" merchandise, an adjustment can be made.[67]

84. Commerce will grant a quantity adjustment if cost savings are demonstrated. Commerce can also be flexible if a respondent tries to comply with their requirements. In *grinding tools*, Commerce noted that although the allocation methodology employed by respondents occasionally resulted in the discount being allocated to sales where none was actually paid, overall the method did distribute the total amount of this discount over all sales on a customer-specific and uniform basis. Given that Commerce was using weighted average prices, they determined that this method was non-distortive. Moreover, since the respondent had numerous home market customers, Commerce found that it would have been unduly burdensome to report an actual sales discount amount for each transaction.[68]

**Cash Discounts**

**CANADA**

85. Revenue Canada will make a deduction in calculating normal value for cash discounts that are "generally granted" in the country of export.[69] Revenue Canada interpret the generally granted requirement as granted and taken, an interpretation that appears to be more restrictive than their rules require. The adjustment is made only if the importer pays within the same time frame as would qualify for the adjustment in the country of export and more than 50 per cent of home market customers benefit from cash discounts.

**USA**

86. Commerce allows cash discounts if they are granted and taken. The burden of proof for obtaining a deduction normally is on the respondent.[70]

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66 Federal Register, Vol. 51, No. 221 Notices (Monday, November 17, 1986), 41522.

67 19 CFR § 353.55(b)(1).

68 58 Fed. Reg. 30149, May 26, 1993.

69 SIMR s. 6.

70 19 CFR § 351.401(b) states that any interested party that claims an adjustment must establish the claim to the satisfaction of the Secretary.

**Deferred Discounts and Rebates**

**CANADA**

87. Revenue Canada will make adjustments for deferred discounts and rebates if they are generally granted, that is, paid on more than 50% of the sales of like goods in the home market and if the importer would meet the terms and conditions necessary to qualify for the discount in the home market.[71]

88. If the 50% threshold test is met on domestic sales and if the Canadian importer meets the same criteria, an adjustment will be made to normal value, whether or not the importer is actually granted the rebate or deferred discount.

89. Revenue Canada's approach could result in a situation where an exporter extends cash or deferred discount terms to 100 per cent of home market customers. Cash discounts may be shown on the invoice. There may be clear instructions about the net amount to be paid on the discount date. If 50.1 per cent of home market sales are paid in time for the customer to receive the cash discount, and if the Canadian importer pays on time, normal value will be adjusted by the weighted average discount granted. Arguably, if the discount meets the generally granted test then the full amount of the normal cash discount should be allowed. However, Revenue Canada imposes both a barrier and a weighted benefits test. It appears that over time, Departmental practice may have departed from intended practice. If only 49.49 per cent take this adjustment, the discount would not be allowed at all.[72] So a Canadian importer could pay an invoice promptly to benefit from a cash discount and take it, or pay by letter of credit. The same importer then could find that simply by following the exporter's normal terms and conditions of sale and paying promptly net of cash discount, an increase in the margin of dumping could occur that could be enough to move them from negligible to significant under the WTO ADA.[73]

90. Revenue Canada's SIMA Handbook is silent on why deferred discounts (like cash discounts) should be treated less favourably than discounts that are granted at the time of sale and reflected in a net selling price on the invoice.

**USA**

91. Commerce in practice does not normally distinguish between "deferred" discounts and other discounts. Common types of discounts recognized by Commerce include quantity discounts, early payment discounts and loyalty discounts. Commerce considers such discounts to be a reduction in price. Rebates are deducted if the terms of the rebate are set at the time of the sale. Volume rebates are based on the level of rebate granted in the most recently completed rebate period. Rebates instituted retroactively after the filing of a petition are not allowed. For Commerce, what is

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71 SIMR s. 6.

72 This figure assumes rounding down.

73 Article 5.8 provides that dumping margins less than 2.0 per cent expressed as a percentage of export price are deemed to be *de minimis*.

important is whether the discount was granted and taken by home market customers, and the cost of differences in circumstance of sale to the producer or exporter.[74]

**Quality Differences**

92. For many reasons including local preference or differences in product standards, there may be physical differences in products sold domestically and for export. Such differences must be reflected in the calculation of normal values and may result in reductions or increases to normal value.

**CANADA**

93. Revenue Canada addresses differences in quality or other characteristics of imported and domestic goods by calculating adjustments under the SIM Regulations.[75]

94. In *beer from the USA*, one respondent (Heileman) argued that Revenue Canada in determining "like" goods should not have take account the type of package in which beer is sold. The major portion of goods sold to British Columbia were sold in a 24 12 4/6 can package configuration, that is 24 cans of beer, each can containing 12 ounces (355 ml), 6 cans secured by a plastic collar and the four 6-packs being set in a cardboard tray. It was requested that normal values be based on sales of a package configuration of 24 12 ounce cans without sub-divisions, or sub-packages. This package configuration was discounted more frequently in the Washington state market. The exporter argued that the packaging should not impact on the selection of like goods.[76]

95. In considering this question, the Department reviewed Heileman's sales of Rainier brand products. The information disclosed a substantial quantity of sales in Washington state of the 4x6 package, although these sales are not in the same volume as sales of the more popular 12 packs. The differences in packaging costs were also analyzed and it was determined that these costs were significant, and in fact surpassing the costs of the beer itself. The Department concluded that the sales that would be used to determine normal values would be the sales of the identical goods sold to Canada as required by SIMA s. 15, i.e., the sales of 24 cans in the 4 x 6 package configuration.

96. The Department treated the packaging difference by making an upward adjustment to normal value pursuant to Regulation 5(a) "to reflect the lower packaging costs with respect to sales made in the domestic market".

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[74] 19 CFR 351.41 and the cost of differences in circumstance to the producer or exporter.

[75] Neither Commerce nor Revenue Canada will consider differences in cost of production where the compared domestic and exported merchandise have identical physical characteristics.

[76] Revenue Canada, Customs and Excise, *Certain Beer Originating in or Exported from the United States, Preliminary Determination of Dumping*, (June 4, 1991), 10.

97. In the P.D. with respect to *certain corrosion-resistant steel sheet*, Revenue Canada noted that the Brazilian exporter CSN (Companhia Siderurgia Nacional) had provided home market sales information only for subject goods with the same type of packaging used for sales to Canada. Revenue Canada rejected this approach because:

> "there were other domestic sales of like goods with different packing type which should have been included in the domestic sales information, since the type of packing is not a determinant in the selection of like goods".[77]

98. In the 1992/93 flat-rolled corrosion-resistant steel case, Revenue Canada's verification teams advised respondents that unless they could provide cost information on gauge and coating thickness cost variables, the verification teams would adjust normal value based on the price book gauge extra as BIA.[78] However, in the *carbon steel plate* investigations, Revenue Canada refused to make *downward* adjustments to normal value based on price book premiums and discounts, because the exporters could not establish the price/cost differentials for the price book extras discounts. Revenue Canada would no doubt argue that they would be pleased to have accurate costs in both cases, if these were available. However, in the absence of accurate costs, Revenue Canada refused to grant discounts, but would contemplate adding premia which were not cost-related.

99. While there is a need to obtain accurate costs, many producers do not keep their costs records on such a detailed basis. One should not draw conclusions based on practices employed in difficult cases - but unusual or unique cases may reveal practices that define the boundaries of the systems and how the AD systems can be employed most restrictively.[79]

100. While the SIMA rules about quality/structure/design adjustments refer to differences in *price*, the application of the rules is limited to differences in cost. Because Revenue Canada, as a matter of practice, requires cost of production data in every investigation, these comparisons are not difficult to make.

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[77] Revenue Canada Statement of Reasons, (March 31, 1994). Revenue Canada imposed a non-BIA duty of 125 per cent against CSN. Commerce found 43 per cent for the same product.

[78] The costing of corrosion-resistant sheet is much more complex than other flat-rolled products, particularly with respect to the variations in gauge that directly affect the volume of coating materials to be used per ton *(or tonne)* (the thinner the gauge, the more surface area in a tonne). The coating thickness also impacts importantly on the cost.

[79] The systems used to calculate normal values and to determine dumping margins are continuously evolving. Much of it is a learning process, particularly when trying to assess actual and competitive costs in an increasingly interrelated business environment. We do not intend to focus only on exceptions. However, administering authorities have considerable discretion in carrying out their responsibilities. The exercise of this discretion can result in extreme or exceptional decisions that establish the boundaries of the system.

**USA**

101. Commerce will make a reasonable allowance for differences in physical qualities of merchandise. In deciding what is a reasonable allowance for any difference in physical characteristics, Commerce will consider only differences in the variable cost of production.[80] Any adjustment is generally limited to differences in costs of material, including assists and labour.[81] It also includes variable manufacturing overhead costs, which are overhead or manufacturing expenses necessary for production or manufacturing operations, such as, tools, utilities or quality control.[82] When an item exported to the USA is not sold in the home market, Commerce may use a similar item for comparison.

102. Commerce may also consider, as appropriate, differences in market value.[83] This is a more subjective measure. However, this is only a potential difference. In practice, adjustments are seldom made for differences in market value.

103. Where the same product with different (varying) specifications is sold in the home market, Commerce usually requires that the respondent demonstrate that sales of goods made to U.S. specifications are in the ordinary course of trade.

104. In *Thermostatically Controlled Appliance Plugs* from Canada, Commerce explained why they had chosen a particular product match:

> "... the Department compared ATCO's sales of the subject merchandise meeting U.S. technical specifications to United States purchasers with ATCO's home-market sales of subject merchandise meeting U.S. technical specifications."[84]

105. Commerce did not take into account ATCO's sales of the subject merchandise meeting Canadian technical specifications based on the assumption that sales to the USA involved only merchandise meeting U.S. specifications, as indicated in the questionnaire response. The appliance plug case appears to be an exception from normal practice.

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80 19 CFR § 351.411.

81 This can include design and engineering work provided by the importer.

82 U.S. Department of Commerce, *flat-rolled* questionnaire, 4-2.

83 19 CFR § 353.57(b).

84 *Thermostatically Controlled Appliance Plug and Internal Probe Thermostats*: *Final Determination of Sales at Less Than Fair Value;* 53 Fed. Reg. 50055, (December 13, 1988).

**Conditions of Sale Adjustments**

106. One of the most important aspects of a normal investigation is the various adjustments made to fair value for differences in selling expenses between home market and export sales. Every dollar deducted from normal value because it is more costly to do business in the home market than in export markets helps to make exports more competitive and reduces the scope for finding dumping.

**CANADA**

107. Conditions of sale adjustments are for direct selling expenses, such as commissions, credit terms, technical assistance and servicing, advertising and other direct selling expenses incurred on sales in the country of export for home market sales, but not incurred on sales for export. Revenue Canada excludes from its conditions of sale adjustments, quality and warranty adjustments, which are addressed separately in the regulations.[85] Revenue Canada imposes no cap or adjustment to reflect the value of the deductions, (other than the total of home market expenses incurred) such as is required for certain calculations under Commerce regulations.[86]

108. The rules are designed to permit adjustments - as envisaged by the WTO ADA - but the granting of such adjustments is not automatic. At times, it is unclear whether in Canada an adjustment should be sought under the regulation 5(d) conditions of sale or regulation 9, which addresses trade level adjustment. If there is an option, section 5(d) would be more favourable. As in the U.S., adjustments may not be double counted.

**USA**

109. Commerce treats direct and indirect selling expenses differently. There will be reasonable adjustments including those involving differences in:

- commissions
- credit terms
- guarantees
- warranties
- technical assistance
- servicing
- advertising and other selling costs.[87]

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85 SIMR s. 5(d).

86 19 CFR § 353.

87 This adjustment applies only to the extent that such costs are assumed by the producer or reseller on behalf of the purchaser from that producer or re-seller.

110. Adjustments will be made for differences in circumstances of sale "which bear a direct relationship to the sales which are under consideration".[88] Examples of directly related circumstances of sale include credit terms, guarantees, warranties, commissions, and product-specific advertising directed at the customers of the purchasers of the product. Expenses that are similar to overhead expenses, such as salespersons' salaries and pre-sale warehousing costs, are not normally considered to be directly related and do not qualify for an adjustment.

111. Where normal value is based on exporter's sales price, since the importer's selling expenses are deducted in the determination of export price, a deduction will be made for actual selling expenses, direct and indirect, incurred in the home market up to the amount of the selling expenses incurred in the U.S. market.[89] A similar rule applies where a commission is paid in one market but not the other.[90] Commerce generally makes a full deduction for all directly related expenses incurred in the home market, and a deduction for actual home market indirect selling expenses, which may not exceed the amount of indirect selling expenses incurred in selling to the U.S. market.

112. Patrick McCrory explained the process to a briefing session for Binational Panelists with the following example:

| | **Home Market** | **U.S. Market** |
|---|---|---|
| Price | 80 | 78 |
| Credit (direct expense) | 5 | 4 |
| Warranty (direct expense) | 3 | 3 |
| Indirect selling expense | 10 | 8 |

U.S. price = (78 - 4 - 3 - 8) = 63
Home market value = (80 - 5 - 3 - 8) = 64[91]

113. In *SCM Corp. v. United States*, the court reasoned that this approach was necessary to ensure a fair comparison and to avoid inflating dumping margins. This provision is now in the statute.[92]

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88 19 C.F.R. § 353.56(a)(1).

89 *Ibid.*, § 353.56(a)(2).

90 *Ibid.*, § 353.56(b).

91 Patrick McCrory - Notes for a presentation to Canadian Binational Panelists, (Aylmer, Quebec, 1989).

92 19 U.S.C.A. § 1677(b)(a)8 and discussions with Gary Horlick, esq.

**Trade Level Adjustments**

114. If there are insufficient home market sales to the same level of trade as the importer, investigating authorities in both countries use sales to the nearest and subsequent level of trade adjusted to reflect differences in pricing/cost of doing business at the inferior trade levels. The principal differences between sales to different trade levels will relate to sales activities performed with respect to sales to customers in the domestic market and in the export market. If the importer in Canada or the USA is at a higher trade level (distributor) than the customer based in the exporter's home market (retailer), the importer will usually perform functions that the exporter must undertake in the home market.

115. The SIMA regulations provide two methods for calculating the trade level adjustment. Revenue Canada prefers the first method.[93] Under this first method, Revenue Canada determines the precise cost of carrying out "in respect of sales in its domestic market, for each selling activity which distinguishes the trade level difference".[94] The SIMA Regulations provide that adjustments may be made only for activities that the exporter or vendor has not performed with respect to or on behalf of the importer in Canada.[95] The Department has focussed on sales activities that serve to stimulate the volume of sales by informing potential customers of the availability characteristics and prices of the goods and by persuading the potential customer to buy.[96]

116. However, the Tribunal in a decision extending such treatment to warehousing expenses, may have in fact reduced the scope for trade level adjustments. In *Madison Equipment* the Tribunal majority argued that:

> "adjustments may only be allowed where the adjustments being sought are sufficiently pertinent to the sales for which the adjustments are requested.[97] In contrast, adjustments related to a general cost of doing business or circumstances of doing business in general should not be allowed".[98]

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93 SIMR s. 9(a)

94 SIMA Handbook s. 5.1.

95 Under SIMR 5(d) arguably there could be an adjustment for the demonstrable cost difference of performing the common functions in each market, if they have not been addressed under Regulation 5(a), (b), (c), or 9(a).

96 SIMA Handbook s. 5(c).

97 CITT Appeal No. 2936.

98 This wording bears an interesting similarity to Commerce regulations relating to adjustments for differences in circumstances of sale, which states "In general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared".

117. The Tribunal majority's argument continued as follows:

> "One test to determine whether the circumstances surrounding a particular transaction are pertinent to the sales for which the adjustments are sought is to distinguish between circumstances directly related, and circumstances indirectly related, to the sales at issue. Under this test, the only adjustments allowable under the Regulations would be those where circumstances are directly related to the sale at issue, that is, those for which there is sufficient evidence to indicate that the expenses were relevant to the transaction at issue, and not a general cost of doing business in general. Indirect circumstances of doing business in general would, in the Tribunal's opinion, be more akin to doing business in general. Claims under this last rubric would not, in the Tribunal's opinion, be adjustments allowable under the present scheme of the Act".[99]

118. In *Madison*, the Tribunal went on to conclude that bad debt expenses and administrative expenses were general costs of doing business and could not be included in calculating the trade level allowance. However, arguably a case could be made (and has been made) for addressing product-specific bad debt expenses under regulation 5(d) if it could be demonstrated that these costs were not incurred or were less burdensome with respect to export sales (and indeed, if possible, with respect to export sales to Canada).

119. The second method that may be employed by Revenue Canada to distinguish between trade levels when information is not available to use is Regulation 9(a). In this case, Revenue Canada *could* rely on the trade level discount generally granted in the exporting country by other vendors of like goods.[100] In practice, Revenue Canada does not favour this approach and does not use it except as a last resort.

120. The Binational Panel in *carpets* established that an adjustment must be warranted, not simply claimed:

> "Our review of the evidence presented to this Panel by Shaw and CRI, as summarized above, reveals that in her determination, the Deputy Minister followed the principles set forth in the Manual, and denied the claimed adjustment for the two exporters in question (Horizon and Shaw) because neither party was able to establish to the Deputy Minister's satisfaction that sales "activities" differed between levels of trade. The Deputy Minister's inquiry into the activities of the two exporters was thorough and the exporters were provided the opportunity to submit the data needed to establish their claim. For these two exporters, the record presented to the Panel for review does not establish a difference in activities."

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99 The wording of that section is rather straightforward and, accordingly, where claims for adjustments specifically relating to trade level differences rather than to the general cost of doing business can be justified and documented, these claims should be viewed favourably by Revenue Canada.

100 SIMR s. 9(b).

> "This Panel also affirms the Deputy Minister's interpretation of the law, insofar as she determined that a level of trade adjustment should not be allowed unless an exporter could establish a difference in activities performed, as distinguished from a difference in the magnitude of the same activities.... Section 9 of the Regulations expressly refers to costs, charges or expenses that "result from activities that would not be performed"."[101]

**USA**

121. The Secretary of Commerce may authorize appropriate adjustments for trade level differences affecting price comparability.[102] Commerce explains their policy on trade level adjustments as follows:

> "We generally wish to compare prices on the different markets at the same commercial level of trade, that is, prices to domestic wholesalers with prices to U.S. wholesalers, and so forth. However, if sales of the merchandise to the United States and in the applicable foreign market at the same commercial level of trade are found to be insufficient in number to permit an adequate comparison, the comparison will be made at the nearest comparable commercial level of trade and appropriate adjustments will be made for differences affecting price comparability.[103]

122. In *OCTG from Canada*, Commerce explained:

> "... Departmental practice is that, in establishing whether there are differences in sales at varying levels of trade that affect price comparability, information substantiating that the differences in the price are the result of differences in the cost of selling at one level of trade as compared to the other must be submitted and verified. Algoma was unable to substantiate information on cost differences. Therefore, we made no adjustment for differing levels of trade."[104]

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101 CDA-92-1904-02, *Certain Machine Tufted Carpeting Originating in or exported from the United States of America*, Opinion and Panel Decision, (May 16, 1993), 34.

102 19 CFR § 353.58.

103 U.S. Department of Commerce questionnaire, *flat-rolled steel products* (Canada) App. IV, 3.

104 *Antidumping; Oil Country Tubular Goods From Canada; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 15035, (April 22, 1986).

123. In *CMTs*, Commerce explained:

> "Level of trade adjustment may be made under certain circumstances when comparing the United States price with actual sales prices in the home or third country markets. Toshiba has not supplied information on what the price of CMTs sold in the home market to a single unrelated distributor would have been nor has it quantified what the selling expenses involved in such a transaction would have been. The Department can not assume that the selling expenses incurred in the U.S. would be the same as those incurred in a hypothetical sale in Japan of the same merchandise at the same level of trade.[105]

124. There does not appear to be much difference in the rules about trade level adjustments between Canada and the United States. Commerce explains clearly that the Import Administration is the final arbiter in approving all adjustments.[106] Our discussion with U.S. practitioners, however, suggests that Commerce seldom grants level of trade adjustments. Revenue Canada does grant them more frequently.

**Credit Terms**

125. If credit terms in the domestic market are longer than for export sales, the normal value should be reduced. However, when favourable credit terms are extended to an importer, this will reduce the actual selling price and may create or intensify dumping.

**CANADA**

126. Revenue Canada will not make credit adjustments unless there is a significant difference in the terms of sale, e.g., credit terms that exceed 30 days. At current interest rates in North America and even in Europe, 30 days credit is generally not a very significant factor. However, at the higher interest rates which exist in many other countries, this adjustment can be very significant. As noted above credit adjustments can work both ways, because if the importer takes extended terms, Revenue Canada will make upward adjustments for credit terms. However, here too they will not adjust unless the difference is greater than 30 days.

127. In high inflation economies, there may be very significant credit components in home market prices. Revenue Canada calculates the credit terms on the basis of when the exporter receives payment (e.g., when the funds are credited to the exporter's bank account). This has led to some rather interesting results in hyperinflationary economies, where transfer mechanisms within the country may not work as efficiently as they do in Canada.[107] The money may be paid by the

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105 *Cellular Mobile Telephones* (CMT) and Subassemblies thereof from Japan, 50 Fed. Reg. October 31, 1985.

106 U.S. Department of Commerce, *flat-rolled steel* questionnaire, App. 4-3.

107 See for example, *polyphase induction motors from Brazil*, administrative review in 1990, where delays of more than a month were experienced between the electronic transfer of

importer in Canada long before it is received by the exporter. Because of Revenue Canada's focus on when the funds are received by the exporter, the Canadian system may make adverse adjustments for credit costs, or deny adjustments, through no fault of the importer, who has paid promptly.

128. Commerce calculates the cost of credit by determining the number of days payment is outstanding and the interest rate the company paid or would have paid if it borrowed funds to finance.

**USA**

129. Commerce examines actual days payment is outstanding usually on a sale by sales basis. However, they will accept in some circumstances average days outstanding based on a company's accounts receivable analysis.

130. Credit costs are calculated by dividing the numbers of days between shipment and payment by 365 then multiplying by the interest rate and unit price. Average historical data is applied to unshipped or unpaid shipments.[108] Sales shipped but not paid either the date of the P.D. or the F.D. (depending on the stage of the investigation) is used as the date of payment.[109]

**Interest Costs/Income**

131. Treatment of interest expenses, including the cost of "poison pills" developed to prevent takeovers, or the cost of financing leveraged buyouts, can have a significant effect on dumping margins. A company with an older, fully depreciated plant, and a low-debt load may be found not to be dumping, but another producer with a new, highly efficient, and highly leveraged plant will be found to be dumping even if they are selling at the same price.

**CANADA**

132. Revenue Canada takes full account of interest expense and non-operating costs but is very parsimonious about granting favourable adjustment for interest income unless it can be very directly tied to the subject goods. Revenue Canada takes guidance from the report of the Binational Panel in Gypsum Board.[110]

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funds and the crediting of these funds to the exporter's bank account. This resulted in a substantial reduction of export prices. This example may be seen as the exception and not the rule. But it will be applied consistently in such situations, which arise more frequently with developing countries than with industrialized countries.

[108] See Preliminary Determination of Sales at Less Than Fair Value: *Grain Oriented Electrical Steel from Italy*, 59 Fed Reg 5991, (February 9, 1994).

[109] *Ibid.*

[110] CDA 93-1904-01.

133. The Panel ruled that

> "The statutory direction that "all other costs" are to be allocated indicates that every type of corporate expenditure, no matter how extraordinary or unrelated to production, is to be allocated to all products in some fair way. Counsel for Revenue Canada stated that they routinely allocate to exported products an aliquot portion of general corporate costs such as executive salaries and business insurance, even though such costs have no direct relation to the production of the exported goods. If the statute is read literally to require the allocation of all costs, be they episodic or unrelated to production, then the peculiar nature of LBO or "poison pill" costs would merely result in an estimated allocation by formula rather than by tracing such costs to the production of particular goods.
>
> Our reasoning is confirmed by considering the situation in which a company makes a single undifferentiated product and has no other activities so that there would be no question of spreading interest or any other costs over more than one product or activity. In that situation, it appears clear that all costs of the company would have to be taken into account if paragraph 19(b) were applicable. The section speaks without qualification of "all other costs", the plain meaning of which does not permit a gloss of excluding some costs of the company that may be characterized as unusual, extraordinary or not related to producing the products of the company. Hence, if the company were to expand to several product lines, the same costs would have to be allocated among the subject goods and non-subject goods."

This was more restrictive than Revenue Canada's previous practice - a remand that has been embraced with exceptional enthusiasm.

**USA**

134. Commerce has addressed the treatment of interest and calculation of profit factors as follows:

> "... The interest expense and interest income reflected on the financial statements were adjusted to include only those items which directly or indirectly benefited the production of CMTs...."[111]

[111] *Ibid.*

**Warranty Expense**

135. Both Revenue Canada and Commerce make allowances for differences in warranty or guarantee of performance.[112] Their rules and procedures are similar.

**CANADA**

136. Revenue Canada determines the percentage of home market selling price represented by warranty costs in the home market and compares this with the warranty information on sales to Canada. Revenue Canada's regulations and approach require them to address actual costs. If the percentage cost, or the cost per unit, is different, then normal value will be adjusted up or down. If the warranty terms available in both markets are identical, Revenue Canada will generally not make an adjustment. This element of the adjustments is a factor when a lesser/greater warranty is extended to the importer.

**USA**

137. Commerce grants warranty and guarantee adjustments as a condition of sale adjustments.[113] This regulation calls for adjustment based on actual cost differences. Commerce normally follows the same practice as Revenue Canada, except that Commerce will make an adjustment when costs differ, even when terms in both markets are identical.

138. In Cellular Mobile Telephones (CMTs), Commerce used the warranty reserve established by one respondent to account for its contingent liabilities for the CMT warranty. Since the CMTs were only marketed recently and the warranty guarantee was for two years, actual expenses as presented would not accurately reflect the costs that could occur for a two-year warranty. Therefore, Commerce used the warranty reserve for CMTs to represent warranty costs for the respondent since this reserve reflected the anticipated costs, based on past experience that should have been considered by the respondent in establishing its price for CMTs.[114] Our U.S. sources advise that CMTs is an exception, not a normal case since it was a constructed value situation, the issue was timing.

**Royalties**

139. Revenue Canada's principal concern is to ensure that royalties are included in the cost of production and reflected in normal values. They consider this particularly important when royalties are paid to third parties. The question of trade marks addressed earlier, which may in some cases be

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112 SIMR s. 5(b).

113 19 CFR § 353.56(a)[2].

114 *Cellular Mobile Telephones and Subassemblies* thereof from Japan, 50 Fed. Reg. 45448, (October 31, 1985).

related. Revenue Canada will address differences in royalties under the adjustments contemplated under SIMR s. 5. Commerce appears to treat royalties in a similar manner.

### Advertising

140. Advertising adjustments reflect differences in per unit advertising costs between domestic and export markets may be an important factor in reducing normal value.

### CANADA

141. Exporters to Canada often claim adjustments for advertising because they generally limit or concentrate their advertising and trade promotion activities to their own market. Such claims are thoroughly verified. Revenue Canada is very sceptical about claims for advertising adjustments and, as noted above, requires detailed substantiation of any requested adjustments. This may be more difficult to prove with respect to imports into Canada from the USA because of the integration of the two markets and the scope for spillover advertising in print and electronic media. In *Beer from the USA*, counsel for petitioners argued there should not be any allowance for TV advertising because of the spillover effects of commercials aired on U.S. border stations. Revenue Canada undertook a detailed examination of where U.S. advertising was placed before agreeing to an adjustment.

### USA

142. Commerce regulations[115] permit an advertising allowance for advertising aimed at the importer's customer not at the exporter's customers either domestically or in the USA. Commerce will not allow claims for advertising in trade journals if the sales under consideration are to an end user. However, similar ads in a magazine could be considered if the sales were made to distributors and the ads were aimed at end users. The most frequently allowed expenses are for ads aimed at customers in general circulation magazines, newspapers or on TV or radio.[116] Revenue Canada does not have a similar limitation.

### Warehousing

### CANADA

143. The Tribunal in *Madison*[117] concluded that adjustment could be made under Regulation 9(1) for warehousing expenses.[118] However, Revenue Canada rarely granted adjustments for warehousing before or after Madison.

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115 19 CFR § 353.56(a)(2).

116 See for example *color picture tubes from the Republic of Korea*, 52 fr 44186, (November 18, 1987).

117 CITT Appeal 2936.

**USA**

144. The Commerce questionnaire indicates that fixed expenses, such as inventory warehousing, that would have been incurred whether or not a sale was made are not regarded as directly related sales expenses.[119] Commerce requires detailed information on warehousing expenses when calculating dumping margins under their related-company (ESP) provisions.[120]

145. Revenue Canada would do the same when calculating export prices under SIMA s. 25 - the counterpart related-party export price testing mechanism.

**Commissions**

**CANADA**

146. Revenue Canada does not deduct selling commissions from the exporter's selling price or from the importer's purchase price, as determined under SIMA ss. 24(a) and 24(b). SIMA s. 24(a)(iii) should be interpreted as referring to costs, charges and expenses associated with the physical movement of the goods rather than costs, charges and expenses related to the sale.

147. However, selling commissions paid to related parties or otherwise forming compensatory arrangements will be examined closely for possible abuse. Any "selling commission" paid directly to the importer or to an agent or other party related to the importer, could be considered a discount, and may be deducted from the export price.[121]

148. However, it can be demonstrated from detailed costing data that selling costs to Canada exceed those in the home market, an upward adjustment to normal value could be made. However, this would be an unusual situation.

**USA**

149. Treatment of commissions by Commerce is one of the most complex areas of their adjustments analysis. Commissions paid to related companies, employees and unrelated persons may be treated differently.

150. Commissions are also treated differently for calculating purchase price and export price.

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[118] This section of the SIM Regulations is about trade level adjustments.

[119] U.S. Department of Commerce, *flat-rolled steel* questionnaire (Canada), Section B6.

[120] *Ibid.*, Section B9(c).

[121] SIMA Handbook.

151. Commissions paid to employees are treated as direct selling expenses.

152. Related party commissions are allowable as circumstance of sale adjustments if they are at arm's length or tied directly to sales.[122]

**Freight/Delivery Costs**

**CANADA**

153. If prices in the country of export are delivered prices or reflect delivery charges, the SIM Regulations provide for adjustment of such home market prices to bring them back to an ex-factory or ex-premises basis.[123]

154. However, Revenue Canada notes that the relevant regulations refer to the "cost of delivery" not only to freight charges, which would probably be the major component. Revenue Canada investigators are advised that other charges directly related to the physical movement of goods would also be included in the scope of cost of delivery.[124]

155. If there is a freight element for a product that is processed in a multi-plant operation, Revenue Canada, in their mandatory cost/profitability analysis, will examine the relevant standard costs and variances and make the necessary adjustment to arrive at actual cost.

**USA**

156. The Commerce questionnaire requires that sales be reported on an ex-factory basis.[125] Commerce and Revenue Canada require that inland freight and other charges be reported separately. Both require actual costs - and can and do require supporting invoices and documentation. If they establish that there is any averaging in the calculation, they will check the basis for averaging; for example, they will review freight invoices to the particular destination over some portion or all of the period of investigation.

157. Commerce rules about establishing freight charges per unit when using common carriers appear to be more detailed than Revenue Canada's but U.S. practitioners have advised that the effects are the same.

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[122] Commerce interprets "or" as "and".

[123] SIMR ss. 7 and 8.

[124] SIMA Handbook, Part 5.C.2.

[125] See *Industrial Phosphoric Acid from Israel*, 52 Fed. Reg. 25441, (July 7, 1987) and *SCM Corp. v. U.S.*, 713 F 2d 1568, 1571-72, Fed Crt 1983, cert. den. 104 s.ct. 1274. The court noted in making fair value comparisons "[b]oth values are subject to adjustment in an attempt to reconstruct the price at a specific, common point in the chain of Commerce, so that value can be fairly compared on an equivalent basis".

**Internal Taxes and Duties**

158. GATT Article VI:4 states clearly that no goods may be subject to either an antidumping duty or a countervailing duty because indirect taxes levied on the goods are not levied or are remitted upon export, in order to avoid double taxation.

**CANADA**

159. SIMR s. 10 provides the authority for making such an adjustment in the determination of normal value, by deducting from the price of like goods used to determine normal value, the amount of the indirect duties and taxes levied on goods sold for home consumption. This deduction is made, however, only where the duties and taxes are included in the price of the like goods and where the duties and taxes are not borne by the goods sold to the importer. That is, where exports are relieved of the duties or taxes by exemption, remission or refund. Where the tax is not imposed on the subject goods destined for export, there is no need for an adjustment to export price - but if home market sales are, for example, VAT-in or tax-in, they must be deducted from the home market price to arrive at a normal value.

160. SIM Regulations 10 refers to "any taxes or duties that are borne by like goods or any materials or components forming a part thereof". The taxes and duties referred to are indirect or commodity taxes, that is, taxes levied on the sale of goods or materials. These may include sale, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and excise duties. They do not include income taxes.

**USA**

161. Commerce methodology is designed to ensure that the credit for commodity tax does not exceed the actual entitlement. Commerce practice is evolving and has been the subject of extensive litigation.

**Special Commerce Rules about Adjustments**

162. Commerce will disregard insignificant adjustments that are defined individually as having an ad valorem effect of less than 0.33 per cent, or groups of adjustments having a value of less than 1.0 as a group.[126] This process is applied with respect to both upward and downward adjustments.

163. Revenue Canada does not work this way: all adjustments are calculated and made and cumulated.

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[126] 19 CFR § 353.59.

Groups are different on:
a) circumstances of sale;
b) physical characteristics;
c) levels of trade.

**Other Methods of Calculating Dumping**

164. When the Deputy Minister believes that there are not enough sales meeting the requirements of the primary method to ensure a proper comparison, the Department then turns to alternative methods to calculate normal values and dumping margins.[127] Commerce follows similar procedures.[128]

165. These methods are:

- Sales of Goods to a Third Country
- Constructed Values (the cost of production model).

166. While Methodology for Imports from State Controlled Economies, which has been very trade inhibiting, is also discussed, many of former state trading countries are developing market economies. Therefore, these issues are not discussed in great detail.

**Non-Market Economies**

**CANADA**

167. Revenue Canada establishes normal value for non-market economies by reference to normal values in a surrogate (third) country.[129] However, in the investigation of *twelve-gauge shotshells* from USSR, Poland, Czechoslovakia and Hungary, Revenue Canada treated both countries as market economies.[130] Practice is evolving and will become less important as the European economies in transition achieve market economy status.

**USA**

168. The procedures followed by Commerce are not substantially different than those followed by Revenue Canada when conducting an investigation under SIMA s. 20.[131]

**Export Sales to Third Countries Methodology**

169. The WTO ADA allows the administering authorities to use export sales to third countries as the basis for establishing normal value.

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127 SIMA ss. 15, 16.

128 19 CFR § 353.48.

129 SIMA s. 20.

130 (ADT-6-79) (Finding) September 27, 1979.

131 19 CFR § 353.

**CANADA**

170. Canada does not have an established priority between sales to a third country and constructed value but rarely uses the third country option:

> "due to inherent difficulties establishing the requirement that sales under paragraph 19(a) fairly reflect the market value of the goods".[132]

171. Revenue Canada's reluctance to employ this methodology is based on a concern that if the exporter is alleged to be dumping in Canada and this has been verified by Revenue Canada's prima facie test, then they may be dumping elsewhere.[133] Revenue Canada has used the third country approach in *waterproof rubber footwear*, but for all practical proposes, it is a dead letter.[134]

**USA**

172. The USA, until 1970, was required to look first to third country methodology. Commerce uses this approach more often than does Revenue Canada.[135] While no longer mandatory for Commerce to examine the third country option first, the legislative history and the regulation state clearly that there is a preference for this option if home market sales are inadequate and before recourse to constructed value.[136]

173. Commerce's proposed regulations envisage that the third country purchase goods most similar to those being exported to the USA in sufficient quantities, and that the market of the third country be most similar in terms of organization and development to the U.S. market.[137] If there are several possible third countries, preference will be given to the largest market.

**Constructed or Cost of Production Based Value Methodology**

174. Revenue Canada and Commerce may calculate normal value on the basis of a constructed cost of production model.[138] Constructed value calculation methods in Canada and the USA are

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132 SIMA Handbook Part 5:D.

133 Revenue Canada practice is not inconsistent with the WTO ADA, which leaves the selection of alternate methodologies to the discretion of the investigating country.

134 A cynical assessment might be that Revenue Canada would adopt this approach only if their preliminary analysis revealed that sales to third markets were higher priced than exports to Canada.

135 See, for example, *pads for woodwind instruments from Italy* - 58 Fed. Reg. 42296.

136 19 CFR § 351.404.

137 *Ibid.*

138 SIMA s. 19(2)b and 19 CFR § 353.48(a).

essentially the same. Both are based on a fully loaded or fully absorbed costs, plus an amount for profit.[139] Under both systems, allocation methodologies are very important, as is the determination of the amount for profit.

## CANADA

175. For purposes of both SIMA s. 16(2)b cost means the cost of production of the goods and the administrative selling and all other costs with respect to the good. This definition harmonizes with SIMA s. 19(b)(i) and (ii). This clarifies a point of disagreement until the most recent amendments of SIMA. The other factor which must be addressed in calculating constructed normal value is "a reasonable amount for profits".

176. Revenue Canada considers that the concept "other costs" in s. 19(2)b has been expanded by the finding of the Binational Panel in Gypsum Board, which stated:

> "To determine that value, the Deputy Minister is directed to calculate the sum of certain specified costs and "all other costs". It is clearly implied that such costs must bear a connection with the subject goods (as opposed to non-subject goods), *but there is nothing to indicate that such costs should be limited to costs caused by the production of the subject goods*, such as head office expenses for the management of the company of which the production of the subject goods forms a part, *and not include other costs which are to be found on the books of the company*."[140] (emphasis added)

177. The Panel went on to explain:

> "Likewise, subparagraph 11(c)(i) specifies that the following two requirements must be met:
>
> - the administrative and selling costs must be directly attributable; and
>
> - the administrative and selling costs must be directly attributable to two specific types of activities - the production and sale of the goods."[141]

178. This interpretation was consistent with Revenue Canada practice, but the Panel then explained:

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[139] See SIMR s. 11 for details of how the amounts for profit are determined or calculated in Canada.

[140] CDA-93-1904-01, *Gypsum Board Originating in or Exported from the United States of America*, Decision and Reasons of the Panel, (November 17, 1993), 27.

[141] *Ibid.*, 28.

> "... all other costs be "attributable to the goods" and that such costs are not included in subparagraphs (i) and (ii). In this context, it is therefore clear that subparagraph 11(c)(iii) does not permit certain costs to be omitted from the pool of costs to be allocated merely because they are not caused by or related to the production of the subject goods."[142]

179. Section 15 of SIMA is predicated upon the use of actual selling prices of like goods in the exporter's home market, made in the ordinary course of trade, as a price with which to compare selling prices into Canada. On the other hand, SIMA s. 19(b) establishes a normal value constructed on the basis of the sum of costs of production, administrative, selling and all other costs attributable to the goods exported to Canada, not the like goods sold in the exporter's home market. An amount for profit is then added. Section 19 is intended as surrogate methodology, to be used in the absence of sales in the ordinary course of trade in the exporters' home market which permits the use of market prices under s. 15 of SIMA, with or without adjustments for differences in quality pursuant to the Regulations.

180. Departmental guidelines for the determination of normal values under s. 19(b) of SIMA states:

> "The regulation contemplates that the administrative, selling and costs attributed to the exported goods will be used, rather than the corresponding costs incurred on domestic market sales."[143]

181. However, Revenue Canada has been judicially instructed to rely on profitable sales of like goods (with the appropriate adjustments under the regulations) in all cases, unless there are no profitable sales of either identical goods or similar goods. Revenue Canada has not conformed to the direction, in *Fletcher Leisure* and *Carpets*, to use s. 15 as modified by s. 16 instead of s. 19(b).[144] Rather, they appealed *Fletcher Leisure* to the Federal Court of Appeal and has attached no precedential value to *carpets*.[145]

**USA**

182. An examination of the relevant Commerce regulations[146] suggests that the cost of production used for constructed cost and that used for determining whether or not sales are less than cost of production are different.

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142 *Ibid.*, 28.

143 SIMA Handbook.

144 *Fletcher Leisure Group Inc. v. Deputy MNR* (1993), AP-90-023, AP-90-127 (CITT) and *Certain Machine-Tufted Carpeting from the U.S.* (1993), CDA-92-1904-01.

145 However, in the Panel Report on gypsum board (CDA-93-1094-01), the Deputy Minister immediately embraced a remand on the scope of "other costs" in SIMA s. 19(2)b. This will tend to result in the calculation of higher normal values.

146 19 CFR 353.50. Note proposed rules 19 CFR §§ 351.405, 351.406 and 351.407 had not been finalized at the time of writing.

**Treatment of Start-up Costs**

183. The WTO ADA attempts to provide improved guidance for the calculation of start-up costs (and other non-recurring expenses), by stating:

> "For the purpose of paragraph 2 of this Article, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations."[147]

**CANADA**

184. Revenue Canada's rules about start-up costs reflect Canada's WTO obligations.[148]

**USA**

185. Commerce has explained their position on cost allocation/amortization as follows:

> "The depreciation method is a means of accounting for the economic value of the equipment over its useful life and is not a means of accounting for the differences in unit costs which may result from the maturity of the production cycle. Thus, a change of the depreciation method would not be considered an appropriate means of accounting for expenses which result from start-up."[149]

186. Commerce noted in CMTs that they account for start-up expenses when such expenses are appropriately justified, supported and quantified. Such expenses that result from the start-up of

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147 WTO ADA Article 2.2.1.1.

148 SIMA s. 23.1 and SIMR s. 13.1.

149 *Cellular Mobile Telephones and Subassemblies thereof from Japan*, 50 Fed. Reg., (October 31, 1985).

production usually relate to "learning curve" and other production flow expenses and are amortized over a reasonable amount of production. In CMTs, Commerce explained:

> "... Product-specified R&D expenses, which are necessary expenses incurred in manufacturing, were included as part of the "fabrication" expenses and were amortized over the market-life of the product. For the cellular-R&D expenses, the Department used six years based on the foreseeable usefulness of the cellular technology and the estimated life of two generations of the product."[150]

187. Following implementation of the WTO ADA, Commerce proposes the following methodology in identifying startup operations under section 733(f)(1)(C)(ii) of the Act:

(i) "New production facilities" includes the substantially complete retooling of an existing plant. Substantially complete retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery.

(ii) A "new product" is one requiring substantial additional investment, including products which, though sold under an existing nameplate, involve the complete revamping or redesign of the product. Routine model year changes will not be considered a new product.

(iii) Mere improvements to existing products or ongoing improvements to existing facilities will not be considered startup operations.

(iv) An expansion of the capacity of an existing production line will not qualify as a startup operation unless the expansion constitutes such a major undertaking that it requires the construction of a new facility and results in a depression of production levels due to technical factors associated with the initial phase of commercial production of the expanded facilities.

188. In identifying the end of the startup period under clauses (ii) and (iii) of section 773(f)(1)(C) of the Act.

(i) The attainment of peak production levels will not be the standard for identifying the end of the startup period, because the startup period may end well before a company achieves optimum capacity utilization.

(ii) The startup period will not be extended to cover improvements and cost reductions that may occur over the entire life cycle of a product.

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150 *Ibid.*

189. In determining when a producer reaches commercial production levels under section 773(f)(1)(C)(ii) of the Act:

(i) The Secretary will consider the actual production experience of the merchandise in question, measuring production on the basis of the units processed.

(ii) To the extent necessary, the Secretary will examine factors in addition to those specified section 773(f)(1)(C)(ii) of the Act, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products. A producer's projections of future volume or cost will be accorded little weight.

190. In making an adjustment for startup operations under section 773(f)(1)(C)(iii) of the Act:

(i) The Secretary will determine the duration of the startup period on a case-by-case basis.

(ii) The difference between actual costs and the costs of production calculated for startup costs will be amortized over a reasonable period of time subsequent to the startup period over the life of the product or machinery, as appropriate.

(iii) The Secretary will consider unit production costs to be items such as depreciation of equipment and plant, labour costs, insurance, rent and lease expenses, material costs and overhead. The Secretary will not consider sales expenses, such as advertising costs, or other non-production costs, as startup costs.[151]

**Purchased Inputs from Related Companies**

191. Revenue Canada requires that all of an exporter's purchases from related companies cover fully absorbed cost or reflect the prices at which similar merchandise/inputs are sold at arm's length in the country of export. Commerce requires evidence of the arm's length price of such merchandise but related party transactions at less than full cost are not acceptable.[152]

192. These practices appear to be very similar in effect.

**General Selling and Administrative Expenses (GS&A)**

193. Prior to the Uruguay Round a number of countries had complained about the use of statutory minima in U.S. constructed value methodology.

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[151] 19 CFR § 351.407.

[152] 19 CFR § 351.

**CANADA/USA**

194. There is no statutory minimum GS&A factor in Canada or the USA; after implementing the WTO ADA, Canada never employed a minimum amount for GS&A.

**Amount for Profit**

**CANADA**

195. In constructed value calculations, Revenue Canada will use the actual profit earned by the exporter or other vendors on home market sales of like or similar goods.

196. Revenue Canada, following SIMR s. 13 in a very rigid manner, excludes series of sales from the amount used to calculate the amount for profit. A more liberal reading of the regulation would permit a combination of sales at a loss and at a profit so long as there is a net profit over the total volume sold. Revenue Canada has numerous approaches deleting *series* of sales that are unprofitable. This practice ignores the mathematical influence of sales at less than full cost, which, in turn, increases the amount for profit.

197. In calculating the amount for profit Commerce will not disregard home market sales below cost. There is no provision in the statute for disregarding sales below cost in calculating profitability, and doing so would, in Commerce's view conflict with the statutory requirement to use "actual profit".

198. To the extent that Revenue Canada still cherry picks by excluding sales at a loss, amounts for profit used by Revenue Canada will tend to inflate constructed normal values above those calculated by Commerce. SIM Regulations appear to require the same treatment, but this practice was not followed in the 1995 *bicycles* administrative review.

**All Other Costs**

199. Revenue Canada has adopted a very broad interpretation of the concept of all other costs. Further, Revenue Canada refuses to offset interest expense with interests income. Binational Panels have reminded the Deputy Minister that such additional costs must be attributable to the production of subject goods.[153]

200. Revenue Canada will include all interest expense related to the production of the goods but will not offset for interest income unless it can be demonstrated to be operational income, that is link the revenue to production of subject goods.

201. While Commerce's practice is similar, it seems to be subject to some variations in methodology as evidenced by their treatment of Hitachi in *Offshore Platform Jackets*:

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[153] See *Certain Beer from the USA* (1992) CDA-91-1904-01, 51.

> "Hitachi states that because of an interest differential on "back-to-back" loans used to finance the purchase of the U.S. project, it receives net interest earning from financing the purchase. It argues that the amount of the earnings is a gain to Hitachi and a detriment to the purchaser. As such, it increases the effective price to the U.S. purchaser. Therefore, United States price should be increased by the present value of the earning."

202. However, Commerce concluded:

> "The interest differential is not the straight difference between the two loans. Because the two loans are in different currencies, any credit earnings are subject to exchange fluctuations. We cannot estimate what effect future exchange fluctuations will have on any earnings. Therefore for purposes of this final determination we are assuming that exchange rate fluctuations will result in the equalization of the two loans. Thus, it would be improper to make an adjustment to reflect credit earnings that may never be realized.[154]

**Generally Accepted Accounting Principles (GAAP)**

203. The WTO ADA requires that the exporter's records be used provided they are in accordance with the generally accepted accounting rules of the exporting country and reasonably reflect the costs associated with the production and sales of the product in question.

204. Revenue Canada and Commerce follow similar practices. Problems arise out of differences of opinion as to whether the exporter's records "reasonably reflect" the production and selling costs of the goods.

**Determination of Export Price**

205. Under every antidumping regime, the same importance must be attached to calculating export price as to the calculation of normal value or FMV.

**CANADA**

206. SIMA s. 24 contains the basic principles for determining the export price of goods sold or agreed to be sold to an importer in Canada on the basis of the lesser of the exporter's adjusted sale price or the importer's adjusted purchase price.

207. The exporter's selling price is reduced by any costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export.[155] Extra cost could be for example

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[154] *Offshore Platform Jackets and Piles From Japan;* Final Determination of Sales at Less Than Fair Value, Fed. Reg. 11794, (April 7, 1986).

[155] SIMA s. 24(a)(i).

export packing. The type of packing on overseas shipments is generally sturdier and more expensive than domestic packing.

208. The deduction of all duties and taxes imposed on the goods by or pursuant to a law of Canada or of a province, including anti-dumping duty, when they are paid for by or on behalf or at the request of the exporter is also required.[156] The exporter of the goods may be paying or reimbursing the importer for a portion or all of the regular Customs duty. In such a case, the export price would be adjusted by subtracting the amount of the payment.

209. All other costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment, from the place of direct shipment of the goods to Canada are also to be deducted from the exporter's selling price, provided that the importer has not paid for these costs, charges and expenses and that they are included in the exporter's selling price.[157] Such costs may include ocean freight, inland freight, docking and wharfage charges and other similar charges.

210. By deducting the above charges, the export price is brought back to the same point at which normal value is calculated, that is, to exclude delivery costs. The comparison of normal value and export price is therefore made on the same basis. This is consistent with the WTO ADA which requires that a fair comparison between the export price and the domestic price, should be made at the ex-factory level.[158] If in practice the factory is the place of direct shipment, it could be said that the values are determined at the ex-factory level.

211. Under paragraph 24(b), a different starting point is used. Starting from the importer's purchase price for the imported goods, the costs, charges, expenses and duties, etc., enumerated in subparagraphs 24(a)(i) to (iii) are deducted. If this price is less than the price obtained by applying 24(a) then this lower figure is used as the export price. [159]

212. Related party transactions cause the most difficulty, because a related importer (in Canada) is required to earn a profit on resale of the product after importation. There is no credit against the exporter's profit for this additional amount for profit.

**USA**

213. The Export Price is the price that is compared to normal value to determine whether or not dumping is occurring, and if so, how much. Commerce has very detailed rules about how the export price is calculated when there is a relationship between the importer and exporter. The process for determining export price is quite complex.

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156 *Ibid.* s. 24(a)(ii).

157 *Ibid.* s. 24(a)(iii).

158 Article 2(6).

159 SIMA Handbook, Section 5.8.1.

214. The export price, based on the related importer's sale to an unrelated party, is normally used. In each case, the transaction price is subject to certain adjustments, designed to bring the price back to an ex-factory basis. Any charges incurred in bringing the merchandise from the factory to the point of sale, e.g., inland freight, ocean freight, marine insurance, U.S. duties and brokerage charges, are deducted from the price where those charges are included in the price. Additions are made for the amount of any import duties and direct taxes imposed by the country of exportation that have been rebated or not collected because of the exportation, and for any countervailing duty imposed to offset an export subsidy. However, there is no deduction for antidumping duties as these are not knowable at the time of importation.[160] Where ESP is used, additional deductions are made for sales commissions and any value added in the USA before its sale by the importer.[161]

215. These U.S. rules, including the cap on indirect selling expenses in the ESP calculation, are very important to Canadian exporters. Canadian exporters often find that their U.S. customers are reluctant to deal with Customs and they must sell on a landed duty-paid basis to their U.S. customers. This means that frequently Canadian exporting firms must be both importer and exporter.

**Exchange Rates**

216. Exchange rate movements may have an important influence on the price (in local currency) received by the exporter. Should the domestic currency be appreciating, returns will be reduced, and dumping margins, if any, will increase.

217. The influence of exchange rates on dumping margins leads to debates about what is in fact the date of sale. The recent Tribunal decisions in an appeal involving exports of ladies leather footwear from Brazil have linked the date of sale to the date when production actually commences.[162]

218. The WTO ADA provides:

> "When the price comparison under this paragraph requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[163], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and, in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements during the period of investigation.

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160 See WTO ADA, Article 2.4.1.

161 These additional deductions are not available if the price to unrelated customers in the USA is set before export (*FCOJ from Brazil*). See 52 Fed. Reg. 8424 (1987).

162 Howmark vs. Department of National Revenue, (AP-92-243).

163 Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

219. Revenue Canada has amended to require that s. SIMR 44 that the exchange rate used be the exchange rate at the date of sale, to make the rules more consistent with the WTO ADA. However, the 60 day grace period in the WTO ADA is not reflected.[164]

220. There would appear to be a greater scope for being caught up in exchange-oriented dumping under Revenue Canada's system.[165] For example, a U.K. exporter selling a product at Cdn$400 over a 6-month investigation period with a normal value of £200 and an exchange rate fluctuating from $1.80 to $2.20 could find about half of its sales dumping by margins ranging up to 10%.

**USA**

221. The date of currency common is the date of sale. The regulations will also provide for WTO-consistent treatment of future sales. Provisions for identifying sustained movements in exchange rates are in development.

**Compensatory Arrangements**

222. Where the exporter or someone other than the importer pays the antidumping duty, Revenue Canada will deduct the compensatory amount from the export price, increasing the amount of antidumping duty the importer will be required to pay.[166]

223. Commerce similarly would deduct from the U.S. price the amount of any antidumping duty that the producer or reseller paid directly on behalf of the importer or reimbursed to the importer.[167] This adjustment is rarely made. Traders are too astute to throw money away in this manner.

**Countertrade**[168]

224. While Revenue Canada has never addressed a countertrade situation, the SIMA handbook describes *barter*, *counterpurchase* (similar to barter but involving two separate contracts that are

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164 A similar issue arose in *aluminium spars* from France (ADT-12-82). The French exporter sold to Canada at a landed duty price. The duty had been suspended at the time the order was booked but was reimposed at the request of the petitioner. This put the exporter in a dumping situation beyond his control. This was explained to the Tribunal during the public injury inquiry: they found no injury.

165 A notable exception would be imports from the USA where normal values and export prices would normally be expressed in U.S. dollars.

166 SIMA s. 26.

167 19 CFR 353.21.

168 Extract from SIMA Handbook.

linked) and *buyback* when the exporter agrees to accept full or partial compensation in product from plant and equipment once it begins operating.

225. The primary difficult in applying SIMA to countertrade is the determination of the export price. Revenue Canada considers all countertrade transactions constitute compensatory arrangements. The export price must, therefore, be determined on the basis of SIMA s. 25(c), (d) or (e), depending upon the nature of the countertrade transaction and the information available. While Revenue Canada has little experience with countertrade, SIMA s. 25(c) and 25(c) can occasionally be applied where the Canadian importer resells the countertraded product to an unrelated purchaser in Canada.[169]

226. While these provisions exist, they are rarely if ever addressed. Commerce no longer mentions countertrade in its questionnaires. It is not clear what they would do with countertrade situations.

**Benefits after Resale**

227. Should the exporter perform services for the importer after products are resold (for example, installation and service), if these were not done in the domestic market, Revenue Canada would make an upward adjustment to export price.[170] We understand Commerce would follow a similar practice.

**Trade Marks**

228. Canada will treat unmarked goods like trade marked goods if Revenue Canada believes the trade mark has been deleted to avoid the application of SIMA s. 15, or the Deputy Minister believes the trade mark will be applied after importation.[171]

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169 More likely, valuation would be on a Ministerial Prescription basis. The specification could be based on the value of the goods exported from Canada when those goods have a market such that a price could be developed independent of the transactions under review. Applying the value of the goods exported from Canada against the quantity of goods countertraded would yield a price that, by Ministerial specification, could be considered the export price to Canada.

170 SIMA s. 28.

171 Trade mark, as defined the Trade Marks Act means:

a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others;
b) a certification mark;*
c) a distinguishing guise; or
d) a proposed trade mark.

* "certification mark" means a mark that is used for the purpose of distinguishing or so as to distinguish wares or services that are of a defined standard with respect to:

a) the character or quality of the wares or services;
b) the working conditions under which the wares have been produced or the

229. If it is concluded that there is no intent to avoid the application of SIMA s. 15, or if the Deputy Minister is not satisfied that the trade mark or facsimile will be added in Canada, then the value may be adjusted under SIMA s. 5 to take account of the difference in the value of trade marked goods as compared to unmarked goods.

230. There is no similar provision in the Commerce regulations. Our U.S. sources doubt that any of Commerce's normal adjustments would apply.

231. Revenue Canada uses the principles of SIMA s. 18 to preclude home market comparisons based on unbranded merchandise when there are no qualifying sales of trade marked product.

232. A brand names issue arose in *beer from the USA*. Revenue Canada explained that Heileman made representations that the sales of the Rainier brand beer in the State of Washington were not an appropriate basis for the determination of normal value. This was because the brand is considered as a premium beer without regular discounts in the state, whereas the Rainier brand sold to British Columbia is a discount beer. It was contended that in selecting like goods for purposes of determining normal value, Revenue Canada should first look to sales of other brands of beer sold as discount beers. No regard should be given to the brand name of the beer. The respondent proposed that the most identifying characteristic of the beer is the fact that it was sold as a discount beer.

233. Revenue Canada examined the nature of the products and concluded that the brand name was the major distinguishing characteristic of beer and concluded that Rainier beer sold in the USA was identical to the beer exported to British Columbia. The pricing and marketing characteristics did not detract from the identical nature of the products. Revenue Canada recognized that there are differences in the manner in which the Rainier brand was marketed in the USA and British Columbia. The legislation and regulations specifically provided that adjustments be made to reflect these differences.

234. Revenue Canada's position was similar to that which the Federal Court outlined in *Sarco*.[172]

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services performed;

c) the class of persons by whom the wares have been produced or the services performed; or

d) the areas within the wares have been produced or the services performed, from wares or services that are not of such a defined standard.

SIMA s. 18.

[172] *Sarco Canada Limited v. Antidumping Tribunal*, Court of Appeal, 1.F.C. (1979).

## XIII. UNDERTAKINGS, TERMINATION AND SUSPENSION AGREEMENTS

1. There are attractions to both exporters and petitioners in negotiating a settlement to an AD investigation particularly if this permits continuing trade.

2. The WTO ADA requires that

> "Price undertakings shall not be sought or accepted from exporters, unless the authorities of the importing country have made a preliminary affirmative determination of dumping and injury caused by such dumping."[1]

3. Both Canadian and U.S. law envisages that respondents may have an antidumping investigation suspended if the exporter gives an undertaking to cease dumping or to raise prices to non-injurious levels. While Revenue Canada has used this provision not infrequently since it was introduced, Commerce has tended to avoid suspension agreements.

### CANADA

4. The Deputy Minister at Revenue Canada may not accept an undertaking until he has made a preliminary determination, provided:[2]

- it covers substantially all the imports under investigation (85%);
- it eliminates the margin of dumping; *or*
- it eliminates injury or threat of injury.[3]

5. An undertaking may not result in a price increase that more than offsets the margin of dumping. While a subsidizing government may offer a quantitative limit on subsidized exports, it is not possible to suspend an antidumping investigation in Canada by offering a quantitative restriction on exports.[4] However, in a recent suspension agreement (uranium from Russia), a highly political case, the limitation is based on volume limits. Nor is this possible in the USA.[5]

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1 WTO ADA Article 8.2.

2 Prior to the WTO ADA the Deputy Minister could not accept an undertaking *after* the P.D. The ADA precludes making undertakings *before* the P.D. Canadian law and practice have changed to meet the requirements of the ADA.

3 The price uplift in an undertaking to eliminate injury may not exceed the margin of dumping.

4 We understand that the concern about quotas is of an anti-trust nature. Some observers, however, argue that the entire AD system frustrates rather than enhances competition. (Source, public discourse by Canadian competition lawyer C.J. Michael Flavell., Q.C.)

5 *Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation*, (October 16, 1992).

6. Canadian complainants will often include several countries in an investigation.[6] Their administrative practice requires that an undertaking cover at least 85% of the imports under investigation (from all countries). However, the U.S. has a different investigation similar for each country. Revenue Canada can join investigations before they go to the Tribunal, and because no undertaking can be accepted prior to the P.D., the preliminary injury test will not be affected. Further, even after an undertaking, the petitioner may request that their injury inquiry proceed. Revenue Canada does not appear to have sound reasons for not making these provisions easier to access and this is a method which can reduce costs and provide greater certainty to traders. As a practical matter, this precludes a country in a multi-country case from resolving the problem by way of an undertaking. Revenue Canada appears to have several problems with individual country initiations when many countries are involved in the complaint. These include the administrative burdens and the greater difficulty of passing the initial and final injury assessment without cumulation.

7. When SIMA was introduced in 1984, the undertaking process was novel to Canada. Petitioners were concerned that officials would conclude agreements that were motivated by political or diplomatic considerations. Some importers and consumers were concerned that exporters might agree to raise prices even if the dumping was not injurious. They wanted a safeguard against bureaucratic or political intervention against needed protection and against unwarranted price increases.

8. However, SIMA provides that an undertaking will be terminated if any interested party (generally any importer, exporter or petitioner) advises the Deputy Minister, within 30 days of the acceptance of an undertaking, that they wish the Deputy Minister to terminate the undertaking.[7] SIMA s. 51(1) requires the Deputy Minister to do so forthwith and that the issue the investigation continue. To date, accepted undertakings have been vetoed in one antidumping case and in one CVD case.[8] In the CVD case, the Canadian Cattlemen's Association invoked the veto in order to pursue the inquiry through to an injury finding after a government-to-government agreement to limit import volumes.[9] This created a substantial strain on Canada-E.U. relations and reinforced the European Commission's inclination to deny to Canadian exporters the ability to conclude undertakings with the E.U.[10]

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[6] This is known as the "cheaper by the dozen" approach to take advantage of cumulation rules.

[7] SIMA s. 51(1)

[8] *Preformed fibreglass pipe insulation* (NQ-93-002) and *boneless beef* (CIT-2-86).

[9] This effectively excluded E.U. beef from Canada.

[10] See Van Bael and Bellis, 151, commenting on of the Community Interest:

> "In *Pentaerythritol*, the Council suggested that it would even take the anti-dumping legislation of the country of origin of the product under investigation into account. The Council stated that: `when examining a possible undertaking from a Canadian exporter, account would have to be taken of the fact that the new Canadian legislation does not provide for satisfactory conditions under which undertakings may be offered by exporters to suspend or terminate proceedings'." *Pentaerythritol* (Canada)

9. There have been a number of undertaking agreements under SIMA designed to eliminate injury (not dumping), including:

*OCTG casings* from Japan;

*carbon steel welded pipe* from Brazil, since extended and terminated with a P.D. and Tribunal inquiry

*porcelain insulators* from Japan;

*preformed fibreglass pipe insulation* (with vapour barrier) from the USA.[11]

10. Permitting exporters to offer undertakings after the P.D. should facilitate the use of this mechanism. The undertaking system could afford more prompt more effective relief to Canada, particularly if Revenue Canada amends its practice to accept individual company and individual country undertakings. However, permitting the exporter to proceed to an injury inquiry, which would terminate the undertaking on a negative finding, could cause petitioners to wonder whether there is any real advantage in the process.

**USA**

11. The suspension agreement system administered by Commerce is also complex. Commerce may suspend an anti-dumping investigation if the exporters who account for "substantially all of the merchandise" that is the subject of the investigation agree either:

1. to cease exports to the United States within 180 days after the date of publication of the suspension agreement;

2. to "revise their prices promptly to eliminate completely any amount by which the foreign market value of the merchandise ... exceeds the United States price of that merchandise"; or

3. to eliminate "the injurious effect" of the imports in question.[12]

12. The criteria for an agreement under the third item listed are spelled out in detail in the statute and are quite difficult to meet. Few such agreements have been concluded; one example is

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OJ (1985) L 13/3.

This statement was, however, removed from the regulation by a subsequent corrigendum (OJ (1985) L 20/46).

[11] This undertaking was vetoed by a Canadian importer, resulting in a P.D. and an affirmative injury finding (NQ-93-002).

[12] Investigations involve individual countries. 19 U.S.C.A. § 16739c)(c).

*Potassium Chloride from Canada*.[13] Discussions of the potash suspension agreement were initiated during the CUSTA negotiations. U.S. farm groups became very actively involved in lobbying against an action that would have increased their fertilizer cost to benefit two relatively minor U.S. producers. The Government of Saskatchewan was also involved in these discussions.

13. A U.S. suspension agreement must be requested at least 45 days before the expected date of the F.D. In Canada, the Deputy Minister may decline to accept any undertaking offered later than 60 days after the P.D.[14] U.S. petitioners are provided an opportunity to comment on the proposed suspension agreement but the ITA is free to proceed over the petitioner's objection. This is also different than the current Canadian system, which allows Canadian producers the "final say".

14. The U.S. Court of International Trade issued a ruling in December 1987, making it harder for Commerce to suspend anti-dumping orders. In a case involving imports of steel plate from the Republic of Korea, the Court said that once anti-dumping duties have been applied, they may not be lifted until Commerce has developed evidence that sales at less than fair value have ceased and that there is no chance that predatory pricing practices will be resumed. In the Korean steel case, the Department had lifted an anti-dumping order on the basis of an agreement by the Korean government to limit exports to the United States of steel plate and other steel products. Most major U.S. steel producers agreed to the suspension of antidumping duties but one small steel maker objected. The Court held that evidence beyond a restraint agreement must be presented by Commerce, to justify a suspension agreement.[15]

15. While the U.S. tends to use suspension agreements rarely, they will employ them to achieve political purposes. The principal example is Commerce's quite imaginative approach to suspension agreements with Russia and several other former Soviet republics, to suspend an antidumping investigations into dumping of uranium.[16]

16. An amendment to the Russian suspension agreement permits exports to the USA in specified volumes provided that each pound of Russian uranium purchased by a U.S. utility is "matched" by a pound of newly mined U.S. uranium.

17. The uranium suspension agreement has been the subject of bilateral consultations under Chapter Twenty of NAFTA because of the prejudice to Canadian uranium exports to the USA.[17] It has also been challenged as inconsistent with U.S. law by U.S. producers and unions. While there are special

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13 53 Fed. Reg. 1393 (1988).

14 SIMA s. 49(4) and s. 57.

15 GATT Document, L/6366, 111.

16 See "Critics Attack Deal to `Harness' Russian Uranium Dumping" Legal Times of Washington, (May 23, 1994).

17 Letters from International Trade Minister MacLaren to Ambassador Michael Kantor dated February 24, 1994 and March 18, 1994.

circumstances and a complex mingling of issues in the uranium negotiations,[18] Commerce sees this as a model for a new approach to suspension agreements - or managed dumping.

18. The Commerce approach was designed to stimulate U.S. production and at the same time enable the USA to meet political commitments to Russia. It was also meant to address Russian threats to slow down compliance with weapons destruction under nuclear disarmament agreements unless they could market their uranium. The revitalization of the former socialist countries of Eastern Europe raises a whole new dimension to anti-dumping law.

**Injury Review**

19. In both the USA, and Canada, even after a suspension agreement is made or an undertaking accepted, exporters are entitled to request the continuation their respective investigations.[19] If both agencies make affirmative findings, an antidumping or countervailing duty order is not issued but the suspension agreement or undertaking remains in effect. If, on the other hand, the exporters prevail before either agency, the suspension agreement lapses.

**Enforcement**

20. If it is determined at any point that a suspension agreement is being violated, Commerce will immediately reopen the investigation and suspend liquidation of entries.[20] Similarly, in Canada, a violation of an undertaking results in resumption of the investigation and the potential for imposition of duties retroactive 90 days from the date of the P.D.[21]

**Termination**

21. Under U.S. law, an investigation may be terminated at any time if the petitioner withdraws its petition, provided that the ITA determines that the withdrawal is in the public interest.[22]

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18 Most important would be the U.S. desire to accelerate the dismantling of nuclear weapons and a concern about disrupting the uranium market for many years to come.

19 This is consistent with the WTO ADA - Article 8.4. See 19 U.S.C.A. ' 1673c(2)(g) and SIMA s. 49(3).

20 19 U.S.C.A. ' 1673c(2)(g).

21 The Tribunal so found with respect to carbon steel from Brazil (NQ-91-003).

22 In negotiating the now-expired U.S. VRA system for steel, complainants agreed to the termination of imposition of AD/CVD duties in return for VRAs. Their refusal to do so in the comatose Multilateral Steel Agreement negotiations has led to an impasse.
Once the petition is withdrawn, there are no grounds for pursuing an action. Under SIMA there is no provision for the Tribunal to abandon its inquiry if the complainant decides to drop out of the process. This did happen once, in the case of stereo consoles (ADT-10-79) (December 31, 1979) when the Tribunal continued its inquiry without participation by the petitioner and found there was insufficient evidence to establish a causal link between the

22. While concerns have been expressed about the possible anti-competitive effects of undertakings, they provide petitioners with more prompt and less expensive relief than proceeding through the full process. With several additional changes to SIMA and to Revenue Canada Administrative Practice, such as modifying the 85% rule and enabling individual countries or exporters to make undertakings, this mechanism could become easier to use in resolving Canadian proceedings at lower cost.

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dumping and possible injury to production of like goods in Canada.

## XIV. THE INJURY DETERMINATION PROCESS

### WTO/GATT

1. The WTO/GATT Agreement requires that a determination of injury

> "... 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."[1]

2. Article 3 of the Agreement establishes certain criteria and obligations on member countries. In effect, it sets out the nature of the inquiry that must be carried out by national authorities. It requires that they examine the volume and price effects of the dumped imports and permits assessment of the cumulative impact of such imports from more than one country. Cumulation is only possible for imports from countries whose margin of dumping is significant (i.e., not *de minimis*) and the volume of imports is not negligible.

3. The national authorities must also take into account an evaluation of all relevant economic factors and indices that have a bearing on the state of the industry, including actual and potential decline in sales, profits and output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investments. The authorities must also demonstrate a causal link between the dumped imports and the material injury and examine any known factors other than the dumped imports which, at the same time, may be injuring the domestic industry. While Article 3 does not contain a comprehensive list of all matters that may affect the health of a domestic industry, it is regarded as the minimum checklist to be examined by the authorities in injury determinations, although no one factor may necessarily give decisive guidance.

4. The WTO ADA does not prescribe how national authorities should organize their domestic laws and procedures to meet the obligations of the Agreement. Canada, the United States and Australia have adopted systems in which injury determinations are made by independent or quasi-judicial bodies and technical dumping determinations are made within the government administration. Such bifurcated systems recognize that decisions on injury caused by dumping requires a subjective assessment of the wide variety of factors noted above, many of which are completely unrelated to dumping *per se*, that may be affecting the domestic industry. By separating the two functions, countries are able to draw on individuals with broader backgrounds and expertise than that normally required to carry out a dumping investigation, to objectively examine the injury issue and facilitate judicial review.

5. The E.U., Mexico, indeed most of other countries using AD systems have, on the other hand, opted for a unitary or administrative system in which both decisions are taken within the government. Indications are that a good many of the newer developing country signatories to the Uruguay Round AD Agreement will, at least initially, also choose this type of system because it is

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[1] WTO ADA, Article 3.1.

perhaps easier and less costly to implement and administer. It should be noted however that the E.U. and Mexico are now moving to separate internally the dumping investigation/decision from the injury inquiry/determination so that different groups within their administrations are responsible for these functions.

**General Approach to Injury Determinations in Canada and the United States**

6. As discussed earlier, Revenue Canada is responsible for preliminary injury assessment in Canada. The Tribunal will only review Revenue Canada's decision and supporting information in the record on request.

7. Revenue Canada appears to perform this function assiduously. See Annex A which indicates how many inquiries actually result in investigations. These inquiries are of differing degrees of detail and sophistication. Some may never result in a formal complaint being filed with the Department for assessment.

8. My principal problems with the Revenue Canada preliminary injury assessment are that it is nearly always limited to information provided by petitioners. This information is not disclosed to respondents. Revenue Canada as a matter of practice does not disclose the existence of a complaint unless and until an investigation is initiated. In rare cases, where the complainant, perhaps to send a signal to exporter/importers to back away from the market, publicly announces their intention to file an antidumping complaint, Revenue Canada will receive input from potential targets but will not reveal details of the complaint.

9. The Canadian International Trade Tribunal (Tribunal) and the U.S. International Trade Commission (Commission) are charged with determining whether dumped imports have caused or threaten material injury to production of like goods in the importing country or have caused or are causing retardation of like goods in the importing country.

10. The Tribunal is required, in general, by SIMA s. 42 to inquire into whether dumped goods have caused injury or retardation or are threatening to cause injury to domestic industry or, would have caused injury or retardation except for the fact that provisional duties had been imposed. They must also inquire into whether there have been "massive" dumped imports that would have caused injury if provisional duties had not been applied. SIMA requires that the Tribunal issue separate findings in respect of dumped goods from each NAFTA country that is involved. In the Canadian system, the issuance of an affirmative order or finding of injury or threat of injury automatically leads to the imposition of antidumping duties. In other words, it is the Tribunal's action of issuing the order that triggers the application of definitive duties and not some later action by Revenue Canada.

11. In the United States, the Tariff Act of 1930 requires the Commission to make both a preliminary injury determination and a final injury determination. The preliminary injury determination process was described in chapter VIII above. As in Canada, the general charging provisions of the Act oblige the Commission to make a final determination as to whether:

(A) an industry in the United States
  (i) is materially injured, or
  (ii) is threatened with material injury or,

(B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or likelihood of sales) for importation, of merchandise with respect to which the ITA has made an affirmative final determination. The Commission must also examine the question of whether "massive" dumped imports are involved and, in so doing, decide whether duties should be applied retroactively to prevent the recurrence of material injury and to ensure the effectiveness of the antidumping duties. In making this latter finding, the Commission must take into consideration the condition of the domestic industry, whether the massive imports were an effort to avoid potential duties, whether foreign economic conditions led to the massive imports and whether the impact of the massive imports likely would continue after the imposition of antidumping duties.[2]

12. The injury inquiry/determination internal process by both the Tribunal and the Commission involves three separate but closely related exercises namely:

- the *Staff* investigation and analysis of all of the data and information concerning the economic, financial, marketing, managerial and other matters that may be affecting the performance or health of the industry, whether received from parties directly interested in the inquiry or obtained by the staff through independent research;

- the *Tribunal Members'/Commissioners'* decisions concerning the scope of the inquiry/investigation, i.e., the nature and composition of the domestic industry and production involved (definition of the like product and concerned);

- the *Tribunal Members'/Commissioners*' consideration of the wide range of factors to be taken into account in determining whether injury is being caused or threatened to domestic industry by the dumping.

13. The nature of the relationship between these groups in the two countries, i.e., *Staff versus Members/Commissioners*, is comparable in the sense that the staff functions almost independently from the Members and Commissioners. The staff's duties are clearly confined to data/information gathering and preparation of economic and financial analysis for inclusion in the Staff Report which becomes an integral part of the Member's/Commissioner's decision-making process. The following paragraphs of this chapter will focus on the overall investigation/inquiry process. Chapter XV explores the decision-making processes followed by Tribunal Members and Commissioners.

14. The Tribunal Members' involvement in the process is significantly different from that followed by the USITC Commissioners. In Canada, Tribunal Members assigned to an inquiry (normally a panel of three Members) are responsible for directing the scope of the staff's investigation, examining and studying the Staff Report and written submissions received from interested parties, for the conduct of the public hearing process and for rendering a final decision on the question of injury. The public hearing, which is the principal difference between the Canadian and American systems, provides an opportunity for Members to gather and test as much information as possible to assist them in arriving at a decision. The hearings are governed by the principles of natural justice and procedural fairness. Accordingly, the process must enable all the parties to know the case they

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[2] 19 U.S.C.A. § 1673 d(b)(1).

have to meet and provide an opportunity to bring forward any evidence they consider relevant in support of their position. The hearings are adversarial in nature so that opposing sides are able to examine each others' evidence and cross-examine each others' witnesses. The Tribunal is a court of record with all the powers, rights and privileges as are vested in a superior court of record. Tribunal decisions are usually by consensus; dissenting opinions are rare.

15. The USITC public hearing process is much more limited than the Tribunal's - generally lasting 1 day and, in very rare situations, up to a maximum of 2 days. The Tribunal public hearings run from 3-4 days in a very simple inquiry, and to more than 2 weeks in complex proceedings (sugar, steel). The Commission process is more investigative than the Tribunal's - relying much more heavily on extensive staff research and analysis. Moreover, because each Commissioner examines the evidence and votes his/her decision independently rather than by consensus, they are each supported by a personal staff who provide analysis and research independent from that available from the Staff Report. Parties to a proceeding in the USITC also appear to have an opportunity to analyze and comment on such data and to file evidence in a substantial pre-hearing submission and thereafter, a more focussed post-hearing submission.

16. Activity by the Commissioners themselves begins once the staff report and all submissions from the parties have been received. There are normally informal briefings of the individual Commissioners by the USITC staff and by each Commissioners personal staff. The Commissioners do not meet as a group nor do they discuss the case or its merits with each other prior to taking a decision. Each Commissioner's vote is announced in a formal public hearing. A tie vote by Commissioners is, by law, an affirmative vote. The USITC issues a report following it's investigation and decision about material injury caused by dumping (sales at less than fair value (LTFV)). If affirmative, this report must be acted upon by the Department of Commerce (DOC) which issues an order directing Customs officials to assess antidumping duties in respect of the merchandise in issue.

17. The United States Customs Court has characterized the Commission's investigations with respect to material injury as fact finding and "non-adjudicative in nature".[3] Accordingly, submissions are sometimes received from Congressmen and Senators who may from time to time also appear witnesses for their constituents. One does not see instances in Canada of Parliamentarians appearing as witnesses before the Tribunal. U.S. trade remedy law expert Gary Horlick suggests that political intervention before the Commission carries little real weight:

> "In practice, both agencies routinely ignore this pressure, which often is seen as a pro forma appearance for constituents (which it usually is)."[4]

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[3] *Edwin J. Madaj, Agency Investigation: Adjudication or Rulemaking? - The ITC's Material Injury Determinations under the Antidumping and Countervailing Duty Laws,* 15 N.C.J. Int'l L. & Comm. Reg. 441 (1990) 441-483.

[4] Gary N. Horlick, *The United States Antidumping System*, p. 99.

**Outline of Procedures for Conducting a Material Injury Investigation**

**CANADA**

18. In the Canadian system, a case does not formally require the attention of the Tribunal and it's staff until a notification is received of an affirmative preliminary determination (P.D.) under SIMA s. 38(2)b. Prior to that time, the Tribunal staff is informally kept up to date by Revenue Canada officials on developments throughout the preliminary investigation. This informal contact enables the staff to do some preliminary work in preparing notices, statistics, gathering public information relating to the industry in Canada and organizing it's internal resources so that the substantive research work can be started as soon as the P.D. is received. As part of it's internal organization process, the Director of Research establishes a "team" of officials consisting of economists, industry specialists, accountants and usually a lawyer to carry out the necessary research in each case.

19. The initial task of the research "team" is to issue questionnaires to all of the Canadian parties (domestic industry, importers and purchasers) named by the Deputy Minister (D.M.) in the P.D. In the corrosion-resistant steel sheet inquiry, the Tribunal issued for the first time a Foreign Manufacturer's questionnaire, a practice normally followed by the Commission.[5] The questionnaires are, for the most part, standardized but are usually modified sufficiently to reflect the circumstances of each case and the particular nature of the industry concerned. They are designed and intended to obtain any information (eg corporate history and affiliations, pricing, import volumes, export activity, inventories, domestic and foreign purchasing activities etc.) that may be helpful to the Members in deciding whether the industry is being injured or threatened with injury. Responses are sought within a short time frame (30 days).

20. Following the issuance of the questionnaires, the serious background research work by the staff begins. Staff officers visit the production facilities of Canadian industry, carry out research into industry and market conditions, and assemble statistics on trade, financing, pricing, sales and other data that may be relevant to the case. On receipt of the completed questionnaires, staff analyze all of this data and seek any necessary clarifications from petitioners and respondents. It should be noted that the Tribunal's staff does not conduct verification audits of information supplied by the respondents to the questionnaires as is done in the United States. These responses are, however, entered as evidence at the Tribunal's public hearing and are subject to cross-examination by counsel for the opposing parties.

21. The Pre-hearing Staff Report, both confidential and non-confidential versions, is the main contribution of the staff to the injury inquiry process. It provides a comprehensive examination of all relevant economic information available on the product and industry in question. The Report describes the industry, provides a profile on the firms in the industry, examines economic indices such as employment, regional considerations, prices, profits, sales, imports, exports and the general competitiveness of the domestic industry vis-a-vis producers in other countries. The Report is the sole responsibility of the staff representing their objective assessment of the state of the Canadian industry. It does not normally attempt to judge the impact or effect of the imports in question on the Canadian industry.

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[5] NQ-93-007.

22. The main research activities of the staff depends to a large degree on the cooperation and voluntary compliance of the parties concerned in an inquiry. There has been no sanction for late questionnaires nor for refusal to respond. The Tribunal has the power to subpoena witnesses and compel parties to submit documents. However, it prefers to rely on voluntary cooperation where possible.[6] In this regard, since the completion of questionnaires can be time consuming and costly, Tribunal staff are generally willing and available to assist parties in understanding and answering the questions. As the Tribunal cannot use information that is not in its records, it is generally in the interest of the parties to cooperate.

23. At the same time as the Staff is compiling information to be included in it's Report, the parties directly involved are actively preparing their cases. The Secretary of the Tribunal, in the notice of initiation for the inquiry, has traditionally requested parties to submit a preliminary brief about 2 months before the scheduled public hearing date.[7] (The hearing is usually held commencing around the 90th day of the statutory 120-day period allowed to the Tribunal for its inquiry.) The preliminary submission is an overview of the position to be taken by a party and outlines it's intentions about the type of evidence to be adduced at the hearing. There are no sanctions for failing to provide a preliminary brief, though it is a good idea to do so in order to focus the Tribunal staff and the members on relevant issues.[8] Indeed, Tribunal staff and members prefer to have as much information as possible early in the inquiry.

24. About four weeks before the scheduled hearing date, the Tribunal circulates its record to all parties. The record is usually voluminous and includes all questionnaire responses as well as both confidential and non-confidential versions of the pre-hearing staff report. Confidential information is only available to independent counsel for a party and then only on receipt of a detailed confidentiality undertaking.[9]

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[6] The procedure would be more efficient, effective and less costly if the Tribunal were to enforce its rules more rigorously. I should note that the Tribunal in the Public Interest Review of *refined sugar* advised interested parties that they would be establishing firm response dates and expected parties and counsel to respect them. This is an encouraging development.

[7] This request for a preliminary submission was not made in *refined sugar* (NQ-95-002).

[8] The factors that the Tribunal addresses are enumerated in Section 61 of the Tribunal Rules.

[9] Independent counsel are required by the Tribunal to be residents of Canada and need not be lawyers. The residency rule is not imposed by law or by the Tribunal rules. This is a condition in the declaration and undertaking form that the Tribunal requires to be signed by all independent counsel seeking access to the Protected Record. The Tribunal adopted the residency requirement after a counsel resident in an Eastern European country appeared to represent one of its exporters in a Tribunal inquiry ADT-3-84. The Tribunal discussed this issue, among others, at a meeting of practitioners shortly thereafter and adopted the residency requirement. Nor are counsel before the Commission required to be members of the bar. In the U.S. and in Canada there has been a trend towards co-ordination between lawyers and trade/economic specialists.

25. The next stage in the proceedings is the filing of witness statements by the parties.[10] The Canadian industry's case is generally due three weeks prior to the public hearing. Importer and exporter cases are due one week later. In situations where the Canadian industry's case is filed late, counsel for an importer/exporter may insist on being given at least seven (7) days from the time of receipt of the Canadian industry's case in order to complete preparation of its own.[11]

26. Submissions to the Tribunal at this stage involve a detailed statement of the position of a party. Section 61 of the Tribunal's rules provides guidance as to what information is useful to the Tribunal. The domestic industry is expected to provide full particulars of alleged material injury. While the financial information included in the manufacturer's questionnaire may be helpful in addressing certain aspects of injury, the witness statements filed at this time provide greater detail. It also provides an opportunity to augment the record with updated or additional allegations of material injury. At the same time, witness statements by importers and exporters try to refute material injury claimed by the Canadian industry. For example, where there are allegations of lost sales or allegations of price suppression on specific contracts, they will be closely examined to determine exactly which exporters were involved and the circumstances surrounding the awarding of the contract/sale.

27. If there are preliminary issues that counsel wish to have aired prior to the hearing, they can ask the Tribunal to convene a pre-hearing or "pre-sit". Issues that have been addressed at a pre-sit include the standing of parties or of their counsel, the nature of the "production" to be examined, and procedural matters that might delay or interfere with the material injury hearing if deferred until the time of the actual hearing.

28. The Tribunal's injury hearing is generally held in Ottawa but may be convened anywhere in Canada. The hearing is nearly always before a panel of three Tribunal members, one of whom is designated the presiding member. The proceedings are relatively informal in comparison to court proceedings, but do follow the general pattern of a trial. After dealing with initial procedural concerns, the Canadian industry generally proceeds to present its case through supplementary or clarifying oral (in chief) evidence. This is followed by cross-examination by opposing counsel, and questions by the Tribunal panel, with an opportunity for re-examination. This procedure is followed in separate public and in-camera (confidential) sessions. The same procedure then applies to exporters and importers. The Canadian industry can, if it wishes, provide evidence in reply.

29. At hearings held by the Tribunal, generally public information is heard first and then the hearing goes in-camera (i.e., confidential, behind closed doors sessions) where attendance is limited to the Panel, Tribunal staff, counsel who have signed a confidentiality undertaking, and the witnesses being questioned. Whenever possible, the Tribunal is flexible about scheduling the order of witnesses and the timing of cross-examination. They will usually seek consensus among the parties and are prepared to alter a proposed schedule of proceedings to accommodate the needs of the parties in general and of witnesses from far away.

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[10] The contents of a witness statement will depend on the facts of the case.

[11] In fact, this is practice, and a reflection of the Tribunal's flexibility, as there is no such rule.

30. SIMA s. 43(1) requires the Tribunal to make its findings not later than 120 days after receipt by the Secretary of the notice of P.D. Since the hearing generally commences around day 90, it is often held over a series of long, intense days. While most cases can be dealt with in a week or less, there is the occasional "big case" that lasts two weeks or more. In those cases, the Tribunal has been known to sit 6 days a week and/or from 9:00 a.m. until late in the evening.

**USA**

31. The Department of Commerce is responsible for determining whether dumping exists and the USITC for the determination on whether an industry in the United States has been materially injured or retarded or threatened with material injury. Most antidumping investigations result from the filing of a petition by domestic industry, a trade association or a labour union. Commerce, but not the Commission, has the authority to self-initiate but such action is rare. Public versions of the petitions must be placed on the public record at both the Commission and Commerce.

32. Within 20 days of filing the petition, Commerce after consulting with the Commission staff, determines if the petition alleges the necessary elements for relief from dumping and includes adequate information supporting the allegations. If so, Commerce begins an investigation. It is relevant to note that both agencies are required by law to provide assistance to small business in the preparation of a petition, if so requested.

33. The Commission must determine within 45 days after a petition is filed whether there is a reasonable indication that material injury or threat of material injury to a domestic industry exists from the dumped imports. If this “preliminary injury determination” is negative the proceeding ceases; if it is affirmative, Commerce continues with it’s investigation until a preliminary dumping determination (P.D.) is made (normally within 160 days from the filing of the petition).If this determination is affirmative, the Commission begins it’s final investigation to ascertain whether injury exists or is threatened. A final decision is required from the Commission within 120 days following Commerce’s affirmative P.D. or within 45 days following Commerce’s final dumping determination, which ever is later.[12] If the P.D. is negative (Commerce does not find less than fair value (LTFV) sales), the Commission is not required to begin its investigation until, and if, a final affirmative determination is made by Commerce. In these circumstances, the Commission investigation commences at this point in time and is to be completed within 75 days.[13]

34. The Commission, like the Tribunal, uses questionnaires as the principal means of obtaining information. The Tribunal's questionnaires are sent to domestic producers, importers and purchasers of the product under investigation. The Commission also sends questionnaires to exporters. The Tribunal rarely does. Commission questionnaires generally cover a 3-year period and request information concerning a wide range of economic indicators, including production, capacity utilization, shipments, exports, sales, employment, capital expenditures and prices. Questionnaires are quite detailed and may be considered burdensome by those companies asked to respond.[14]

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[12] 19 U.S.C.A. § 1673d(a)(2).

[13] *Ibid.*, § 1673d(a)(3).

[14] Interviews with petitioners in the U.S. *flat-rolled steel* cases indicated that their participation in the process included 1- to 2-day verification visits by Commission staff.

The Commission enforces its filing rules and specific statutory authority to ignore submissions received beyond the specified time limits.[15]

35. The Commission staff is organized into an investigative team that is led by a Supervisory Investigator from the Commission's Office of Investigations, which also provides an investigator, accountant/auditor and statistical support. The team will also include a commodity analyst,; an economist; and an attorney from the Commission Office.[16]

36. The "team" is responsible, among other things, for examining questionnaires for accuracy. Selected responses are subjected to on-site verification visits by staff auditors and accountants. The Staff also identifies and uses secondary data sources such as trade associations, market research firms, libraries and interviews with producers, consumers importers, etc. The data collection phase is followed by a period during which the staff compiles, analyses and aggregates the information and presents it in such a way as to be of maximum use to the Commission. This is accomplished in the Staff Report which is a factual, impartial and objective summary of all the relevant data. The Staff is responsible for maintaining complete files which at the end of the investigation will become the official record and may be used in any subsequent judicial review of the investigation.

37. Interested parties may also be invited to submit written briefs during this phase of the investigation and a public hearing may be held by the Commission at which the parties involved may present their views on the investigation. All information received by the Commission, including business confidential information, is released to the parties under administrative protective orders to assist them in presenting their case to the Commission. The staff report does not contain a recommendation on the merits of the case.

38. Activity by the Commissioners themselves begins once the staff report and all submissions from the parties have been received. The parties to the investigation have the right to appear at a public hearing to state their case.[17] In the final investigation, parties file a brief prior to the hearing (which

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[15] 19 U.S.C.A. § 1677(e) provides:

> "Information shall be submitted to the administering authority or the Commission during the course of a proceeding on a timely basis... If information is submitted without an adequate opportunity for other parties to comment thereon, the administrating authority of the Commission may return the information to the party submitting it and not consider it."

In *Atlantic Sugar, Ltd.* v. *United States*, the Court of Appeal held that the Commission

> "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available."

744F.2d 1556, (FED. CIR. 1984), Court of Appeals for the Federal Circuit.

[16] The Tribunal staffs each inquiry with a Director of Research, one or more researchers, an economist and a lawyer. There is no audit staff, but several of the research staff have the skills to analyze the financial and production data that forms an important part of the record.

[17] In preliminary investigations, the hearing is held by the Commission's Director of Operations, rather than by the Commissioners. Commissioners are provided with a

is not subject to a page number limit) and a post-hearing submission of limited length (10 pages less attachments). However, parties may answer questions asked by the Commissioners at the hearing by way of a post-hearing submission, and these written answers are not limited in their length. Counsel for the parties can play an important role in the early days of an investigation, helping the Commission staff to develop its questionnaires.[18]

39. The information gathered during the hearing and through the submission of parties is compiled into a final report from the investigative staff to the Commission. The Office of Economics provides a memorandum on economic issues and the Office of General Counsel does the same for legal issues. The Commissioners' personal staffs review this information. The personal and professional staffs generally meet with individual Commissioners who wish to discuss the information in the investigative record. The Commissioners do not meet as a group nor do they discuss the case or it's merits with each other prior to taking a decision. The Commissioners vote in open meeting, with any tie-vote resulting in an affirmative determination. Reasons in support of decisions are then drafted with the assistance of the Commission's General Counsel.

40. Commission procedure may be frustrating to parties who would like to test information in the record more extensively. The Commission views itself as an investigator, not an adjudicator. The parties obviously believe they are in the middle of what looks very much like a lawsuit. There is a definite clash of perceptions, which may inflame tempers on both sides. While the Commission does not discourage help from the parties, it appears to rely much more heavily on information and arguments generated by staff than it does on the submissions of the parties.

41. The length of public hearings is one of the most significant differences between the U.S. system and the Canadian system. In Canada, a very substantial portion of the hearing time of up to 2 weeks is taken up with cross-examination of the domestic producers' case. In that sense, counsel for the respondents do take on a much more important role in "truth seeking" than do the counsel in the Commission proceedings. Note that in Bethlehem Steel Corp. v. United States the Court of International Trade has held that although counsel are to be given disclosure of confidential information as an aid to effective advocacy, "counsel are not empowered to act as independent investigators".[19] They are not to be permitted to attempt a "pure duplication of the agencies function..." See also Sacilor Acieres v. United States, where the Court held, in connection again with the availability of confidential information under a protective order, that one "should not confuse a role of a party to an administrative investigation with that of a litigant in a court of law".[20]

42. The structure of the Commission investigation has implications for judicial review. Because the record is compiled in what may appear to be an indiscriminate manner (everything submitted to the Commission becomes part of the record) and without the test of cross-examination or rebuttal, it is the very rare case in which a Commissioner is unable to find record support for whatever proposition

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transcript of the hearing.

[18] CITT Staff is also receptive to constructive input from interested parties or their counsel.

[19] F. Supp. 70, 73 (Court of International Trade, 1989).

[20] 542 F. Supp. 1020, 1025 (Court of International Trade, 1982).

that Commissioner wishes to assert.[21] For this reason, reversal of a Commission determination because it is unsupported by substantial evidence in the record is rare.

**Overview Comparison of Other Procedures between the Canadian and United States Systems**

**Access to Confidential Information**

**CANADA**

43. SIMA and the Tribunal's Rules of Procedure spell out the obligations and guidelines regarding the treatment of information submitted during the course of any inquiry or proceeding.[22] Where information (defined as including evidence) is supplied for the purposes of an antidumping inquiry under SIMA, every party to the proceeding has rights of access to the data unless the information is designated as confidential. When a party requests that information be treated as confidential, they must also provide a summary of the information, or a statement indicating that such a summary cannot be made, which will become part of the public record. Information so designated cannot to be disclosed by any person employed in the public service of Canada other than to the counsel (who need not be lawyers) for a party to the antidumping proceedings.[23] The disclosure of confidential information is subject, however, to any conditions the Tribunal considers reasonably necessary to ensure that it is not made available to business competitors or rivals of the person to whom the information relates. The Tribunal strictly enforces the confidentiality provisions of the Act and it's Rules of Procedure so that parties have full confidence that their vital business information will be protected.

**USA**

44. The Omnibus Trade and Competitiveness Act of 1988 increased the level of information available to counsel for parties to the Commission's antidumping investigations.[24]The Act requires the Commission to release all proprietary information under administrative protective order, with certain limited exceptions for privileged and classified information, and for "specific information for which there is a clear and compelling need to withhold from disclosure."[25] The protective order

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[21] This is also true of the Tribunal's record.

[22] SIMA ss. 82 to 85.

[23] SIMA s. 84(4) defines the term "counsel", in relation to a party to proceedings under SIMA, to mean:

> "legal counsel and includes any person, other than a director, servant or employee of the party, who acts on behalf of the party in the proceedings".

[24] Madaj, Agency Investigation, 464-465. Madaj notes that the 1979 Act specified that the Commission could be required by the U.S. Court of International Trade to release domestic price or cost of production information concerning the like product that was submitted by the petitioner, or an interested party in support of the petitioner.

[25] 19 U.S.C.A. § 1677 P(e) (West Supp. 1990); *Omnibus Trade and Competitiveness Act* of 1988, § 1332, 102 Stat. 1208 (1988).

obliges persons who have access to such documentation to protect its status by only using the information in Commission investigations and limiting its disclosure only to authorized personnel of interested parties, including outside counsel and experts, persons subject to ITC sanctions and in certain situations to in-house counsel. All confidential and protected information must be returned or destroyed as directed by the ITC.

45. Madaj summarizes the effects of the protective order provisions of the 1979 and 1988 Acts as that of merely enhancing the:

> "rather limited role played by the parties to the investigation. They do not give the Commission's investigation the characteristics of a trial or a formal adjudication, with the rights of `appraisal, confrontation and cross-examination' .... The most that may be said is that the agency's proceeding has been made significantly more transparent to the parties (or, more accurately, to the counsel or other representatives under the protective order, since the parties themselves generally do not obtain access under the protective order)".[26]

**Cross-Examination/Testing Evidence**

**CANADA**

46. As noted above, the Tribunal provides a full opportunity for cross-examination of all witnesses and the testing of evidence in the course of it s public and in-camera hearings. In this connection, it is relevant to note that Tribunal Members also use this opportunity to question witnesses themselves and, in certain instances, the Tribunal will subpoena it s own witnesses to appear at the hearings to provide information and data that will not likely be forthcoming directly from the parties.

**USA**

47. Scope for cross-examination at Commission hearings is limited and discouraged by Commission procedures and timelines. As a matter of practice the Commission does afford an opportunity for limited cross-examination at its brief public hearings in final investigations. This, however, tends to be quite brief because the time taken for cross-examination is charged against the limited time allotted to parties for their oral presentations. Cross-examination is not permitted at the "staff conferences" held in the case of a preliminary determination.[27] (delete footnote) In Avesta AB. v. United States, the Court noted that

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[26] David Palmeter, *Representing Exporters and Importers in U.S. AntiDumping Investigations* 3RIB.L, 19. In *Wieland Werke, AG.* v. *United States* (718 F. Supp. 50, 62 (Ct., of Int'l Trade 1989), the Court of International Trade held that "the Commission is entitled to rely on its own data, and need not rely" on data "just because it is submitted by a party to a proceeding".

[27] 750 F. 2(d) 927, 936-37 and n. 14 (Federal Circuit 1984).

> "Congress has stipulated that antidumping proceedings are ... investigatory rather than adjudicatory in nature. In an investigative proceeding, an agency need not provide these rights of appraisal, cross-examination, and confrontation applicable in an adjudicatory proceeding." [28]

48. Moreover, the Commission is not limited to the testimony given at the hearing in making it's determination but can rely on the results of it's investigation. In Canada, the Tribunal's decision must in all cases be based solely on the evidence and data in its record that was before it in the hearing.

**Argument/Post-hearing Submissions**

**CANADA**

49. The Tribunal's public hearing is concluded with argument by counsel and interested parties acting on their own behalf. This argument is nearly always oral. It relies on the advocacy skills of the presenter to focus the Tribunal's attention on the important elements of their case. Counsel will also support their arguments with references to the record and to Tribunal precedents. Infrequently, the Tribunal will request written arguments (usually when timing does not permit oral summations). The Tribunal has received both oral and written argument in certain cases, eg Tomato Paste and Cold-Rolled Steel Sheet, though this had not been the norm and has not been repeated since.[29] The Tribunal rarely requests written post-hearing submissions because of the tight time constraints in the law.

**USA**

50. The Commission process does not envisage oral argument. It does, however, provide for the filing of post-hearing briefs and submissions of limited length (10 pages plus attachments).

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[28] 689 F. Supp. 1173, 1189 (Court of International Trade 1988). Referred to in Madaj, Agency Investigation, 456, n. 84.

[29] NQ-92-006 and NQ-92-009.

**Individual Voting vs Consensus**

**CANADA**

51. The Tribunal panel, generally composed of three members, will, in most cases, operate on the basis of consensus.[30] In those cases where consensus is not possible, a dissenting opinion will be registered. The minority member will explain his/her dissent in some detail as an attachment to the majority's Statement of Reasons issued following the decision.[31]

**USA**

52. The six Commissioners vote individually, without discussing their votes with the other Commissioners. They vote in public (in the sunshine) and their reasons are provided thereafter. If there is a tie-vote, an affirmative decision is deemed to have been rendered.[32]

**Statement of Reasons**

**CANADA**

53. It is normal Tribunal practice to issue detailed reasons in support of their decisions. The Tribunal's record in any particular case is vast and often includes conflicting evidence on the same issues. There is evidence in the record to support virtually all views. Without testing, this evidence could be given whatever weight a panelist chooses. Credibility is an important factor in attaching weight to the issues. The hearing process helps the Tribunal establish credibility of both witnesses and their evidence.

54. The Tribunal's statutory duty to issue detailed reasons in support of their findings does not mean that it must deal with every possible question of law, fact, or discretion that may be raised or bear upon the decision. However, the reasons may be required to meet a certain minimum standard of adequacy.[33] Similarly, in de Smith's Judicial Review of Administrative Action, it is said that the

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30 In several inquiries the panel was composed of five members.

31 There have been several dissents including: *Tillage Tools* (ADT-11-83), *Photo Albums* (NQ-90-003), *Refined Sugar* (ADT-4-84), *Soda Ash* (ADT-7-83), *Stainless Steel Plate* (ADT-18-82), *Surgical Gloves* (ADT-3-77), *Mirror Tile* (ADT-1-76), *Colour TV Sets* (ADT-4-75).

32 19 U.S.C.A. § 1677(11). See also MBL (USA) Corp. v. U.S., CIT 1992 787 F. Supp. 202 and Metallverken Nederland B.V. v. U.S., CIT 1989, 728 Supp. 730.

33 This matter has been reviewed in the Binational Panel Review of cold-rolled steel sheet CDA-93-1904-08. The Panel found that:

> "... there must be some evidence to support Revenue Canada's decision so that it cannot be said that the decision was made in a perverse or capricious manner or without regard for the material before it. In applying this standard review, there must be objective evidence that Revenue Canada acted reasonably."

concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate.[34]

**USA**

55. The final phase in the process before the Commission is the public briefing where each Commissioner formally announces his or her determination in a case. As indicated above, a tie vote, by law, is an affirmative vote. Following the voting, each Commissioner prepares a statement explaining the reasons for his/her decision and these statements along with a non-confidential version of the staff report are transmitted to the Secretary of Commerce for action i.e., issuance of an antidumping order if the decision is affirmative or termination of the investigation if the determination is negative.

56. While Commission and Tribunal procedures differ in important ways, both impose onerous burdens and costs of compliance for petitioners and respondents. While both agencies seek much information from parties, Commission procedures are more dependent on written submissions by parties and staff investigation. The Tribunal, whose process has been shaped by Canadian courts, provides much more time for oral hearings and cross-examination.

[34] de J. Evans, *Smiths' Judicial Review of Administrative Action*, 4th Edition, (Stevens and Sons Limited, London, 1980), 136.

## XV. EVALUATION OF INJURY CAUSED BY DUMPING

1. The previous chapter examined the injury determination process in both the Tribunal and the Commission. Particular emphasis was placed on the procedures followed in each organization and the role and functions of the staff and parties in the preparation, assembly and submission of data and evidence relevant to the decision(s) required from Tribunal Members and ITC Commissioners in determining whether or not material injury is being caused or threatened to domestic industry by dumping.

2. This chapter concentrates on the actual decision-making functions of the Tribunal and the Commission. It is divided into two parts. The first part examines the elements involved in decisions relating to establishing the framework against which the impact of dumped imported goods is assessed. Issues concerning "like product", composition and definition of "domestic industry" and "production", the meaning of "major proportion of production", "regional markets" and exclusions from orders are discussed.

3. The second part of the chapter reviews the factors taken into account by Members and Commissioners in their evaluation of the effect of the dumped imports on domestic industry/production. These include causation, dumping margins, price undercutting, output/market share, price suppression, profit erosion, employment, impaired investment, special treatment of capital goods, capacity utilization, cumulation, changes in demand/consumption patterns, and consumer preference/quality.

### PART I

### Like Product

### WTO/GATT

4. The WTO ADA defines "*like product*" as:

> "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration."[1]

5. The establishment of the "like product" category or class is crucial for the purposes of assessing injury in an antidumping proceeding. In the Canadian and United States systems, the definition of the goods subject to the antidumping investigation is established by Revenue Canada and Commerce respectively as the investigating authorities responsible for determining if dumping is taking place. The product class of goods found by these agencies to be dumped, in turn, generally sets the parameters for defining the scope of the domestic industry producing like or comparable goods that may be adversely impacted by the imported dumped goods. The Tribunal or the Commission must have a clear picture of the nature and composition of the domestic industry and it's production

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[1] WTO ADA Article 2.6.

before it can begin it's primary task of judging whether the dumping is, in fact, causing or threatening injury. In this connection, it is relevant to note that in both countries an "injury finding" can be limited to a narrower class of goods than that was originally identified by either Revenue Canada or Commerce.

## CANADA

6. This basic WTO ADA definition of "like product" is carried into Canadian law in s. 2(1) of SIMA but is expanded somewhat (as in the U.S. legislation) to take into account "uses". The definition of "*like goods*" in SIMA is:

> "(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."[2] (emphasis added)

7. As indicated above, Revenue Canada is responsible for establishing the class of goods found to be dumped. This product description is clearly set out in the preliminary determination and, in effect, circumscribes the Tribunal's inquiry since it cannot examine the effects of imported goods not found to be dumped.[3] However, disputes arise over the definition of "like goods". The Tribunal must decide whether domestic producers of substantially similar goods are like to those identified by Revenue Canada and accordingly included in the Tribunal's assessment of the impact of the dumped imports. Typically, it is in the interest of respondents to ensure the like goods market is as broad as possible so that their exports/imports will appear to hold a smaller market share.[4] The converse is true for the domestic industry.

8. One of the first Canadian cases on the definition of like goods to be reviewed by the Federal Court was *Sarco Canada Limited* vs. *The Antidumping Tribunal et al*.[5] There the applicant brought an action for judicial review of the Tribunal's decision, arguing that by emphasizing the functional substitutability of the goods in issue to the imported goods, the Tribunal had ignored other characteristics and qualities of the goods in rendering its decision.[6] The Court, in it's decision, noted that while the Tribunal did ascribe more weight to functional similarity than to other

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2 SIMA s. 2(1).

3 However, both the Tribunal and the Commission may not attribute to dumping the injury which has been caused by undumped goods. See SIMR 37(1)3.

4 See *pillowboots from Romania* (ADT-9-82).

5 [1979] 1 F.C. 247 (C.A.)

6 The definition of "like goods" in SIMA is somewhat more expansive than that found in the previous legislation, the *Antidumping Act*, R.S.C. 1970, A-15, as amended. The second part of the definition of "like goods" reads as follows in the *Antidumping Act*: "goods the characteristics of which" rather than "goods the uses and other characteristics of which"...

characteristics in defining "like goods", it was not able to conclude that it did not consider other characteristics.

9. Similar support for the "functional substitutability" test can be found in the *Stainless Steel Pipe and Tubing* inquiry.[7] There, in deciding whether imported *seamless* tube and pipe were like goods to domestically produced *welded* tubes and pipes, the Tribunal held that since the two had a close degree of substitutability, were often identically priced, and the choice to use one over the other was often dictated on such grounds as individual preference or immediate availability, they were to be regarded as like goods.[8] The decision of the Tribunal in *tomato paste* confirms that the matter of "functional substitution" continues to be an important consideration in the determination of what are "like goods". In that decision the Tribunal concluded that "crushed tomatoes are not like goods" for the purposes of the inquiry primarily because they contain seeds and skin which precludes their utilization in a large number of tomato-based products in which tomato paste is normally used.[9]"

**USA**

10. The U.S. law defines "like product" as a product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation".[10] In substance, this definition is quite similar to that in SIMA. While the Commission must accept Commerce's determination of the class like goods for purposes of injury analysis, in practice, it may choose to define the class or classes of domestic products differently than the class of imports identified by Commerce. Indeed, the Commission is more prone to create separate classes of like goods than the Tribunal, although the Tribunal can achieve the same result by excluding goods from its orders.[11]

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7 (1980), 1.C.E.R. 84.

8 See also the decisions in *Airless Paint Spray Units* (ADT-2-80), 2 C.E.R. 122; *Cars Produced by or on Behalf of Hyundai Motor Co.* (CIT-13-87), 16 C.E.R. 185; and *Fertilizer Equipment, Produced or Exported by or on Behalf of Speed King Industries* (CIT-3-87), 14 C.E.R. 290, where the Tribunal rejected a narrow interpretation of "like goods" by holding that the identical in all respects requirement had to be strictly satisfied before goods that closely resemble imported goods are ignored for the purpose of determining material injury. For more recent cases on the issue of like goods see: *Black Granite Memorials of all sizes and shapes and Black Granite Glass in thicknesses equal to or greater than three inches, originating in or exported from India*, Inquiry NQ-93-006 (July 20, 1994); and *Certain Corrosion-Resistant Steel Sheet Products*, NQ-93-007 (July 29, 1994), where domestically produced "galvalume", a product with higher aluminum content than the subject imported products investigated by the Deputy Minister, was held not to be "like goods".

9 *Tomato Paste in Containers Larger Than 100 Fluid Ounces, Originating in or Exported from the United States of America*, NQ-92-006 (March 30, 1993), 8. The reference to "NTSS Count" is a reference to the "soluble solids" in the composition of tomato paste.

10 19 U.S.C.A. § 1677.10.

11 See *corrosion-resistant steel* (NQ-93-007) and *cold-rolled steel sheet* (NQ-92-007).

11. The Commission has held that the decision on the appropriate like product or products in an investigation is a factual determination, to which the standard of "like" or "most similar in characteristics and uses" has to be applied on a case-by-case basis. Generally, the Commission disregards minor variations and looks for clear dividing lines between possible like products.[12]

12. In defining like product, (and the definition of the relevant domestic industry) the Commission generally considers a number of factors, including:

(1) physical characteristics and uses;
(2) interchangeability of the products;
(3) channels of distribution;
(4) customer and producer perceptions of the product;
(5) the use of common manufacturing facilities and production employees and processes; and
(6) where appropriate, price.

13. No single factor is determinative and the Commission may consider other factors relevant to it's like product determination in a particular investigation. Subsets of these factors are also applied in particular situations such as where the Commission must decide if intermediate or semifinished products are like finished imported products.[13]

14. In some instances, the Commission has defined the class of domestically produced like products more broadly than the class described by Commerce for purposes of initiating and conducting its investigation.[14] In other instances, they have narrowed the class. In those cases where the

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[12] *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Investigations Nos. 701-TA-319-332,334,336-342, 344, and 347-353 (Final), Investigations Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), Commission Pub. 2664 (August 1993) (hereafter "1993 ITC Flat Rolled Carbon Steel Investigations").

[13] *Flat Rolled Carbon Steel* Investigations, (1993 ITC). See e.g., *Asociacion Colombina de Exportadores de Flores* v. *United States*, F. Supp. 1165, 1169 n.5 (1988). *Calabrian Corp.* v. *United States*, F. Supp. 377, 382 n.4 (1992). In analyzing whether a semifinished product should be considered a like product with the finished products under investigation, the Commission typically examines five factors, including:

1) the necessity for, and costs of, further processing;
2) the degree of interchangeability of articles at different stages of production;
3) whether the article at an earlier stage of production is dedicated to use in the finished article;
4) whether there are significant independent uses or markets for the finished and unfinished articles; and
5) whether the article at an earlier stage of production embodies or imparts to the finished article an essential characteristic or function. See, e.g., *Stainless Steel Flanges from India and Taiwan*.

[14] *See, e.g., Torrington Co. v. United States*, 747 F. Supp. 744, 748 (CIT 1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991).

Commission has narrowly defined "like" products, the courts have required the Commission to clarify its rationale for so doing and have required evidence in the record that clearly and explicitly differentiates between the like products.[15]

**Domestic Industry/Production**

15. Article 4.1 of the WTO ADA defines the term “domestic industry” as

> “the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”

The ADA requires that the investigating authorities examine:

- the effect of dumped imports on prices in the domestic market;[16]

- the volume of dumped imports to determine whether it has increased significantly, either in absolute terms or relative to production or consumption in the importing country.[17]

16. These definitions have remained virtually unchanged from what was negotiated in the original GATT Antidumping Code. The wording has, however, resulted in considerable discussion and debate over the years both within the GATT and in national administrations and has been subject to interpretations by the Tribunal and the Commission. Concepts such as “major proportion”, the treatment of production for domestic consumption versus production for export, the inclusion of all or only a portion of domestic firms in domestic “industry”, whether agricultural producers are producers within the terms of the Agreement, etc. have all been the subjects of submissions by parties in specific cases.

17. In this regard one of the most important issues relevant to the definition of domestic industry in both countries is how to analyze and identify production for the purposes of assessing the effect of the dumped goods. To some extent this is a question of the availability of data to separately identify distinct production processes and producer’s costs and profits. This becomes a major difficulty where the multiple products are manufactured by the same work force, in the same facilities and are marketed jointly with other products of the firm. Both Administrations examine production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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15 See e.g., *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands,* Inv. Nos. 701-TA-275 - 278 and 731-TA-327 - 331 (Final), USITC Pub. 1956 (March 1987); *Certain Fresh Cut Flowers from Peru, Kenya, and Mexico,* Inv. Nos. 303-TA-18 and 731-TA-332 and 333 (final), USITC Pub. 1968 (April 1987), *remanded, Asocoflores,* 693 F. Supp. at 1170 (Ct. Int'l Trade 1988).

16 WTO ADA Article 3.1.

17 *Ibid.*, Article 3.2.

**CANADA**

18. SIMA defines “domestic industry” as “the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.” “Injury” is defined as “material injury to a domestic industry”.

19. The range of issues related to the definition of industry that have been addressed by the Tribunal in recent years is described below.

20. The Tribunal has taken the position that the volume of dumped imports must be assessed in relation to *production for home consumption*. The AD Agreement prescribes very clearly that any injury due to changes in the export performance and productivity of the domestic industry may not be attributed to dumped imports.[18] The issue of what constitutes "domestic production of like goods" was an important issue in *Hyundai* where most of the goods produced by the complainants were actually exported to the USA and the "like goods" to the goods under investigation were largely produced in the USA and imported into Canada.[19] The Tribunal held that it was restricted to considering the issue of material injury to "domestic production for domestic consumption". The Tribunal noted that the activities of Hyundai in the USA were not of concern to the Tribunal because "this matter lies outside the scope of SIMA".[20]

21. On the issue of *captive production*, the Tribunal has ruled that it must examine all production, not only the production destined for open market sale. As such, production for internal transfer has been ruled to be a proper subject for the material injury inquiry[21] In *tomato paste*, the Tribunal stated the following:

> "... The Tribunal does not agree with the complainant's initial position that tomato paste destined for internal use should not be included in the production in Canada because there was no sale of the product."[22]
>
> "The fact that there is no sale, in itself, does not preclude the product from being considered as production in Canada. Neither SIMA nor the Code

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18 *Ibid.*, Article 3.5.

19 CIT-13-87.

20 *Ibid.*, 16.

21 See *Tomato Paste*, NQ-92-006 and *Hot-rolled Steel Sheet* NQ-92-008.

22 *Canadian International Trade Tribunal, Decisions and Review Findings, Tomato Paste in Containers Larger Than 100 Fluid Ounces, Originating in or Exported from the United States of America*, (NQ-92-006) (March 30, 1993) 5.

> restricts the meaning of production in Canada to the expression "production in Canada for sale in Canada." [23]

22. On the question of producer/exporter/importer relationships, the ADA is quite explicit that the national authorities may use their discretion to exclude related firms from the definition of “domestic Industry”. When complainants are themselves importers of dumped goods, respondents will argue that these complainants should be excluded from the scope of production in Canada which could mean that, in the case of a sole producer, there would be no production in Canada. Alternatively, it will be argued that such imports constitute self-inflicted injury. In the decision with respect to *Bottoming Materials of Natural and/or Synthetic Rubber*, the Tribunal refused to apply the exclusionary provisions of the AD Code because this would deny the existence of an industry.[24] The exclusion from "domestic industry" of certain producers because they are related to exporters who are dumping into Canada or who are themselves importing dumped products into Canada is discretionary and rarely granted. In these cases, importing producers have generally claimed a “self defence” rationale.

23. The Tribunal was asked in the *Optical Contact Lenses*[25] case to exclude those domestic producers who did not belong to the Canadian Contact Lens Manufacturing Association on the basis that these producers were subsidiaries of companies exporting from the three countries named in the P.D. of dumping or were themselves importers of the dumped goods. The Tribunal acceded to this request on the basis that the members of the Association, who manufactured between them 72% of Canadian production, were sufficient to constitute “domestic industry” for the purposes of determining material injury. The Tribunal went on to note that "not to exclude these producers [i.e., those that were related to exporters who were dumping or were themselves importing dumped product] would be tantamount to concluding that an important part of the industry concerned could be said to be inviting injury.[26]

**USA**

24. The U.S. law defines “domestic Industry” in the same terms as those used by the WTO AD Agreement. While related party status is the only basis upon which the Commission may exclude data relating to a member of the domestic industry, Congress has provided the following guidance on when "appropriate circumstances" exist to exclude some producers:

> "The ITC is given discretion not to include within the domestic industry those domestic producers of the like product which are either related to exporters or importers of the imported product being investigated, or which import that product. Thus, for example, where a U.S. producer is

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23 *Ibid.*, 5.

24 (1982), 4 C.E.R. 322 (ADT-7-82). The Tribunal adopted a similar position in *alpine ski poles* (ADT-5-84).

25 (1984), C.E.R. 309 (ADT-15-83).

26 *Ibid.*, 320.

> related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry." [27]

25. The Commission's practice on exclusion of related parties is similar to the Tribunal's. Domestic producers who are related to exporters, or are themselves importers, *may* at the discretion of the Commission, be excluded in "appropriate circumstances" where inclusion of data of that producer would distort the data on the condition of the domestic industry.[28]

26. The Commission's concern in a related party situation is whether the relation of the producers to exports or importers of dumped products gives them an unusual or sheltered position in the market, unlike that of the other producers, thus providing the Commission (if it were to include all domestic producers in its analysis of the domestic industry's condition) an inaccurate assessment of material injury.[29] An example of an instance where the Commission decided not to exclude certain domestic producers from the "domestic industry" can be found in *Silicon Metal from China*, and an example of where the Commission declined to exclude a domestic producer is found in *portable electric typewriters,*[30]

27. The Court of International Trade has approved the Commission's exclusion of a related party in situations where the producer is related to the foreign exporter, appears to have benefited from the consistently lower prices of the dumped imports, and where the exporter appears to have been directing its exports in such a manner so as not to compete with its related U.S. importer/producer."[31] The primary factors that the Commission examines in deciding whether appropriate circumstances exist to exclude the related parties include:[32]

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[27] July 1993, *Professional Electric Cutting and Sanding/Grinding Tools From Japan*, Investigation No. 731-TA-571 (Final), USITC Publication 2658, 21-22.

[28] See, e.g., *Shock Absorbers from Brazil*, Inv. No. 731-TA-421 (Preliminary) (USITC Pub. 2128 Sept. 1988).

[29] One concern that led to this provision was that workers would not be protected if dumping between related parties were permitted, or if the dumping party would not or could not prove injury.

[30] 731-TA-472, (USITC Pub. 2385) (June 1991) and *Portable Electric Typewriters From Singapore*, Investigation No. 731-TA-515 (Final), (USITC Pub. 2681, September 1993) 7-8.

[31] *Ibid.*, 22.

[32] *See, e.g., Torrington Co.*, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd*, Slip Op. 92-1383, -1383 (Fed. Cir. March 5, 1993) (Court upheld the Commission's practice of examining these factors in determining that appropriate circumstances did not exist to exclude related party). The Commission has also considered whether each company's books are kept separately from its "relations" and whether the primary interests of the related producers lie in domestic production or in importation. *See, e.g., PET Film*, USITC Pub. 2383 at 17-18 (May 1991); *Rock Salt from Canada*, Inv. No. 731-TA-239 (Final), USITC Pub. 1798 at 12 (January 1986).

1) the percentage of domestic production attributable to related producers;

2) the reason why importing producers choose to import the articles under investigation -- to benefit from the unfair trade practice or to enable them to continue production and compete in the domestic market; and

3) the position of the related producers vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry.

28. In making its determination whether a domestic industry is materially injured by reason of LTFV imports, the Commission is required to evaluate the condition of the domestic producers *as a whole* of the like products, or producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. The impact of the dumped imports must be evaluated in relation to U.S. *production* of a like product. According to the Commission, the statute defines domestic industry in terms of *production*, not in terms of markets, distribution channels, or similar factors.[33]

29. Before the URAA, the Commission consistently held that there was no statutory basis to *exclude* captive production and shipments from their analysis of the condition of the domestic industry in determining whether there is material injury to a domestic industry by reason of the subject imports. The statute directed the Commission to consider the condition of "the domestic producers as a whole of a like product" in the U.S.A.

30. During the pre-WTO period, the Commission generally considered both captive and merchant market production data in its determination of whether there was material injury to the domestic industry under consideration. The Commission has stated that while the extent of captive consumption is relevant and important as a condition of competition in the domestic industry under consideration, the Commission will decline to evaluate the competition and the effects of subject imports solely on the basis of the merchant market segment of the industry in issue.[34]

31. While captive consumption[35] is a condition of competition relevant for assessing the condition of the domestic industries and for assessing causation issues, the Commission has also noted in captive production cases that imports under investigation may not affect open-market and captive production the same way.[36]

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[33] 1993 ITC *Flat Rolled Carbon Steel Investigations,* 16. *Thermostatically Controlled Appliance Plugs from Canada, Japan, Malaysia and Taiwan,* Invs. Nos. 701-TA-922 and 731-TA-400 and 402-404 (Final), (USITC Pub. 2152) (January 1989), 8-9.

[34] 1993 ITC *Flat Rolled Carbon Steel Investigations,* 15.

[35] Product that is like goods at one stage of the production chain, but is used in further processing.

[36] *U.S. International Trade Commission, Publication 2662,* July 1993, *Certain Special Quality*

32. In the 1993 U.S. flat-rolled steel investigations, petitioners argued that the Commission should assess the condition of the domestic industry as well as the matter of injury to the semifinished domestic industries by excluding "captive" production of special quality semifinished steel, i.e., the special quality semifinished steel products that are consumed by domestic producers to make special quality bars.[37] Petitioners stated that the

> "impact of imports should be measured against trade sales of domestic product and apparent consumption of product should be based upon trade sales of domestic and imported product."[38]

33. The Commission denied their request, and included captive production in their analysis.[39]

**Major Proportion of Production**

**WTO/GATT**

34. An essential prerequisite for imposing antidumping duties is that material injury must be caused to the industry in the importing country producing like goods *through the effects of the dumping*.[40] (emphasis added) It has not been evident in Canada or the U.S.A that the Commission or the Tribunal consider that the injury caused by dumping must in and of itself be material. The AD Agreement provides that, generally, the term "domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes *a major proportion* of the total production of those products".[41]

35. The conscious use by the drafters of the words *a major* rather than *the major* has made it clear that the portion of domestic production need not be more than 50 per cent.[42] The requirements of Article 4.1 of WTO ADA have not changed with respect to a major proportion requirement, except for the definitions found in Article 5.4, which deal with the question of the level of support required

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*Carbon and Alloy Hot-Rolled Steel Bars and Rods and Semifinished Products from Brazil*, Investigation No. 731-TA-572, 21-22.

37 Petitioners' Pre-hearing Brief, 10-11.

38 *Ibid.*, 10.

39 *Ibid.*

So did the Tribunal, particularly in *hot-rolled steel sheet*. U.S.-Uruguay Round implementing legislation makes it easier for the Commission to focus on the merchant market.

40 *Carpets* (CDA-92-1904-002).

41 1994 AD Agreement, Article 4.1.

42 *Frozen Prepared Pre-cooked Dinners* (ADT-5-74).

for the initiation of a complaint which was discussed previously. These matters are discussed in greater detail in Chapter 7.

## CANADA

36. As a practical matter, the Tribunal seeks information for its injury determination from *all producers*, whether or not they have been complainants or support the complaint.[43] The general nature of the information required is contained in Tribunal Rule 61, which was discussed earlier. The Tribunal will also seek information about unusual or product-specific issues that may have an impact on the dynamics of the industry and may influence the validity of injury claims.

37. In *Brunswick International (Canada) Ltd.* vs. *Antidumping Tribunal*, the Federal Court of Appeal considered whether the Tribunal had defined "domestic industry" in accordance with the provisions of Article 4 of the Code.[44] The Court held that the phrase "... output of the product constitutes a major proportion of the total domestic production" refers to those producers whose output was "significant" and was not a reference to the more precise mathematical computation of one-half. In so holding, the Federal Court of Appeal was able to dismiss the claim of the applicant that the Tribunal's decision should be set aside because it had held that there was material injury to domestic production where one domestic producer producing less than one-half of the total domestic production existed.[45] Also see the Tribunal's reasoning respecting what constitutes a domestic industry in the *Polyphase Induction Motors* case.[46]

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43 See the reasons in the negative injury determination in *Pillowboots from Romania* (1982), 4 C.E.R. 395, ADT-9-82.

44 (1979), 1 C.E.R. 327.

45 The complaint was brought by two domestic producers who accounted for 70% of total domestic production. The ADT found that the smaller of the two domestic producers was not being injured. The significantly larger of the two domestic producers whose output was found to constitute a major proportion of total domestic production was the only one being injured, and that was held to be sufficient to find that the domestic industry was being injured. See also *Photo albums with Self-adhesive Leaves* (CIT-18-84) (1985), 9 C.E.R. 108, where the largest domestic producer was deemed to be the industry. See also *Frozen Precooked Dinners from the U.S.A* (ADT-5-74). On the other hand, in *Solid Urea*, (CIT-9-87) C.I.L was held not to be the industry since its sales accounted for less than 10 per cent of total Canadian production of solid urea. C.I.L. had filed a regional complaint (east of the Ontario-Manitoba border) and the Tribunal had determined that the regional market test could not be met. Therefore, it had to assess C.I.L.'s production and the impact of dumped imports in the context of the entire Canadian market.

46 *Polyphase Induction Motors* (CIT-5-88), 2 TTC 1097 (CITT); referred to on appeal as *Westinghouse Canada Inc.* v. *Canadian International Trade Tribunal* (1989), 2 TCT 4276 (F.C.A.).

**USA**

38. The Commission's task is to examine whether the domestic industry as a whole is experiencing material injury. From time to time, petitioners try to segment that industry in order to make an affirmative finding easier. The Commission may determine that there are several classes of like goods. But they hold to the principle of examining the state of all producers of those goods.

39. In *Bars and Rods from Brazil*, petitioners urged the Commission to assess the condition of only one portion of the domestic producers, those so-called Class 1 producers producing special quality steel, because these producers constituted a "major proportion" (in excess of 80 percent) of domestic production of special quality steels. The Commission rejected the submission that it should limit its definition of the domestic industry producing the like products to only that for part of the domestic industry (Class 1 producers).[47] The Commission noted in its decision that its evaluation and judgement must relate to the domestic industry as a whole, not its individual components.[48] The Court of International Trade has confirmed this approach of the Commission.

**Regional Market Issues**

**WTO/GATT**

40. A domestic industry may be limited to producers in isolated or *regional market*s within a national territory if certain stringent tests are met.[49] In order to establish that a regional market exists, it must be demonstrated that:

- the producers within the regional market sell all or almost all of their production in that market;

- the demand in the regional market is not supplied to any substantial degree by producers located elsewhere in the national territory.

and that where a regional market is found to exist, two additional qualifiers of material injury must also be found:

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47 19 U.S.C.A. § 1677(C)(iii); *See e.g., Calabrian Corporation v. United States*, Slip. Op. 92-69 (CIT 1992) 18. See *Cooperweld Corp. v. United States*, 682 F. Supp. 552, 569 (CIT 1988); *National Association of Mirror Manufacturers v. United States*, 696 F. Supp., 642, 647-48 (CIT 1988).

48 See *Cooperweld Corporation v. United States*, 682 F. Supp. 552, 569 (CIT 1988); see also *United Engineering & Forging v. United States*, 779 F. Supp. 1375 (CIT 1991) ("The focus of the ITC ... is on whether or not the domestic industry as a whole is experiencing material injury.") [*U.S. International Trade Commission, Publication 2662*, July 1993, *Certain Special Quality Carbon and Alloy Hot-Rolled Steel Bars and Rods and Semifinished Products from Brazil*, Investigation No. 731-TA-572, 23.]

49 WTO ADA, Article 4.1.

- there must be a concentration of dumped imports into the regional market; and

- the dumped imports must be the cause of injury to the producers of all or almost all of the production within that regional market.

41. Further, Article 4.2 specifies that where the above conditions have been met, antidumping duties can only be levied on the products in question consigned for final consumption in that regional market. The U.S. had constitutional problems with regional application of duties. However, the law now provides that Commerce should try to restrict imposition of duties to firms exporting to the regional market during the investigation period.[50]

**CANADA**

42. In a SIMA s. 42 inquiry, if the Tribunal finds that a regional market exists, the finding of material injury will only result in the imposition of antidumping duties on goods entering that regional market.

43. In the *Fertilizer Equipment*[51] decision, the Tribunal had to consider whether the four Western provinces constituted a separate regional market. The information before the Tribunal was that producers and importers located in the western market sold exclusively to that market. Producers in other regions of Canada did not sell into the western market. Thus, as the requirements of Article 4(1)(ii) of the AD Agreement had been met, the Tribunal then had to decide whether "dumped imports are causing injury to the producer(s) of *all or almost all* of the production within such market", a necessary requirement for a finding of injury in a regional market. The Tribunal found that the damage to the complainant was not sufficient to render a finding of injury, since the complainant constituted only 75% of the total production in that region. The Tribunal was of the view that "a share of production that is close to 75% falls far short of constituting `all or almost all' of the production in Western Canada".

44. The claim of injury to a regional market also failed *Solid Urea*.[52] There, C-I-L Inc. was the sole producer in eastern Canada and shipped its products entirely in Eastern Canada and Northeastern-Central United States.[53] However, the Tribunal also found that solid urea produced in Western Canada was marketed in significant volumes in the Eastern Canadian market. According to data supplied to the Tribunal by Western producers, such shipments had grown to account for 11.5% of the estimated Eastern Canadian market between July 1, 1984 and June 30, 1987. Given this, the Tribunal was of the view that there was no regional market within the meaning of Article 4 of the AD Code.[54]

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50 19 U.S.C.A. § 1671 e(c)2.

51 CIT-3-87.

52 CIT-9-87.

53 The Tribunal ruled that the substantial volume of exports to the United States.

54 See also the decision in *Barbed Wire* (1985), 10 C.E.R. 186, (CIT-7-85).

45. With regard to the issue of *concentration of dumped imports* The Tribunal has in the past used both the density test and the distribution and ratio tests to measure the degree of concentration involved in particular regional injury cases This matter was explored in a number of cases including *beer, yellow onions,* and *portland cement*. The following excerpts from the decision on *Iceberg Lettuce* will provide some indication of the decision-making process involved in these issues.

> " in 1991, dumped imports accounted for 56 percent of the B.C. market, which is eight times greater than the share held by non-dumped subject imports and is one and one-half times greater than the share held by local growers."[55]

> "In support of the density test, the distribution test reveals that, for the 1991 crop year, 17 percent of the total subject imports were consumed in British Columbia. In addition, the ratio test indicates that, for the 1991 crop year, British Columbia's share of total subject imports into Canada was 1.22 times British Columbia's share of total Canadian consumption of Iceberg lettuce. In the view of the majority of the Tribunal, the distribution and ratio tests take on added significance given that dumped subject imports accounted for 56 percent of the total B.C. market in the 1991 crop year." "For the foregoing reasons, the majority of the Tribunal concludes that there is a concentration of dumped imports into the regional market."[56]

46. Tribunal Member John C. Coleman concluded in his dissenting opinion:

> " that the Tribunal must have some understanding of the situation of the entire domestic industry before it can come to a judgement on concentration of dumped imports into the regional market."[57]

**USA**

47. Under U.S. law, the same four conditions as outlined above are necessary to obtain an order of material injury for an industry located in a regional market. The decision on whether or not to use regional analysis is left to the discretion of the Commission on a case by case basis. The main factors considered by the Commission in exercising it's discretion are whether a separate geographic market exists and whether that market is isolated and insular.

48. In *Atlantic Sugar, Ltd. et al v. United States,* the Court of International Trade held that the statutory provision allowing division of the U.S. market into regional markets, if the demand in the

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55 Canadian International Trade Tribunal, Decisions and Review Findings, *Fresh Iceberg (Head) Lettuce Originating in or Exported from the United States of America*, Inquiry No. NQ-92-001, November 30, 1992, 9.

56 *Ibid.*, 10.

57 *Ibid.*, 17.

regional market "is not supplied, to any substantial degree, by producers ..." located from outside that market, did not permit supply from outside the market that was more than insubstantial.[58] Thus, 12 percent supply from outside the regional market would be regarded as substantial, unless such supply was largely concentrated in the periphery of the region. If the balance of the region (i.e., other than the periphery) received extremely limited shipments from outside the region, the Court was of the view that it could be said that the demand in the region was not satisfied from elsewhere to any substantial degree.

49. On the question of material injury to "all or almost all" of the producers in the region, see *CEMEX, S.A. et al v. United States et al*.[59] CEMEX had challenged the decision of Commerce that had found that "all or almost all" of the regional producers in the southern-tier states had been materially injured by the LTFV imports. CEMEX urged the Court to hold that the "all or almost all" language required a finding of material injury to 80 or 85 percent of production. The Court held that the statute, case law and practice did not suggest that the Commission was bound by any precise mathematical percentage. *Rather, the determination of "all or almost all" had to be made on a case-by-case basis.*

50. In *Certain Welded Carbon Steel Pipes and Tubes,* the issue was the requirement of concentration of dumped imports into a regional market.[60] The Commission held that there was no such concentration when 20 percent of the imports entered the region in 1982 and 1983, and the ratio of imports to regional consumption was lower than the ratio of imports to national consumption in those years.[61]

## PART II

## FACTORS AND INDICES

51. Article 3.4 of the WTO ADA requires that national authorities, in determining whether dumping is causing or threatening injury, to evaluate all the relevant economic factors and indices having a bearing on the health of an industry. Article 3.4 refers specifically to the following in this regard: actual or potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual or potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. It concluded by noting that this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

52. Both Canadian and the United States legislation require the Tribunal and the Commission respectively to examine the relationship between the economic, financial and other relevant data of

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58 USITR, 2 CIT 295 (Dec. 28, 1981).

59 790 F. Supp. 290 (April 7, 1992).

60 USITC Pub. 731-TA-211 (January 1986).

61 See also *Texas Crushed Stone v U.S.*, CIT 1993, 822 F.Sup, and Mitsubishi Materials Corp v. U.S. CIT 1993 973 820 F. Sup 608.

the domestic industry and it's production and the full range of factors identified in the ADA plus any others that may be having either a positive or adverse influence on it's general state or health. Through this process Tribunal Members or ITC Commissioners are put in a position to develop a view as to what, if any, particular factors are having an injurious affect on the industry and to isolate whether, in fact, material injury is resulting from the dumped imports. As indicated above, the injury from dumping need not be the only identifiable cause of injury being suffered by the domestic industry nor need it be more significant than any other cause. It must, however, be injury which is material in degree. It is important to note in this connection that Tribunal Members and Commissioners serve in their own individual capacity and are required to bring their own judgement to the fore in arriving at a decision as to whether an injury to a domestic industry results from dumped imports. This is not a scientific exercise. While efforts have been made over the years in both organizations to streamline and quantify the decision-making process, *it remains a very subjective process in which each Member and Commissioner must rely on his/her own analysis and assessment of the impacts involved.*

53. Neither the Tribunal nor the Commission are limited in their examination of factors that might be reviewed in the course of their inquiry. Indeed, interested parties (importers, exporters and the domestic industry) and their counsel make every possible effort to raise in their briefs, submissions and oral presentations any issue which they consider could support their position. Based on a review of the case law, it appears that the Tribunal and Commission will not ignore their previous decisions in this area but each case is judged on its own merit.

54. Following is a list of some of the factors that have been considered and commented upon by both the Tribunal and the Commission in their past decisions.

- Whether **"irrevocable tenders",** where no goods are actually imported, could be found to be injurious. Both countries treat the irrevocable tenders as "sales" and thus actionable.[62]

- **Price matching or follow-down dumping to maintain market share** has been addressed by both the Tribunal and the Commission and found to be injurious. In other words, exporters and importers cannot engage in marketing activities such as matching prices to maintain market share, albeit at dumped levels without being considered to be engaged in injurious dumping.[63]

- **The effect of dumped imports on profits** through lost sales and on profit erosion due to price suppression. In *12 Gauge Shotshells* both domestic producers suffered price suppression and erosion which caused serious loss of profit. The Tribunal also addressed this matter in *Preformed Fibreglass Pipe Insulation*.[64]

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62 SIMA s. 2.1. and *alternating current electric generators for Italy* (Ansaldo) (ADT-8-83).

63 See *Hot-Rolled Steel Sheet*, CITT NQ-92-008; *Cold-Rolled Steel Sheet*, (NQ-92-009), *Soda Ash* (ADT-7-83); *Gypsumboard* (NQ-92-004); *Hot-Rolled Steel Sheet* (NQ-92-007).

64 NQ-93-002.

- Both the Tribunal and the Commission focus much attention on **price undercutting**. Price suppression is generally the petitioner's argument of choice when import prices are actually above domestic prices or have been following domestic prices down. The Tribunal addressed price undercutting and the concept of "deep discounting" in *Fork Lift Trucks from Japan, USA and U.K.*[65]

55. Likewise the Commission considers whether "there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States," and whether "the effect of imports of such merchandise is otherwise to depress prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[66] In making it's decision, the Commission examines a number of factors including the degree of substitutability between domestic and imported merchandise in question. The less substitutable products are, the less likely that the potential purchaser will make their purchasing decision based on price differences between the products.[67]

- **volume of dumped imports**. The AD Agreement requires that the authorities consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.[68] The Tribunal Rules enables it to request complete detailed data on volumes. While the Tribunal typically bases its decisions on a number of items, including import volumes and market share, the Tribunal has found injury in a situation of declining imports and market share.[69] This might occur when the Tribunal finds that the volume of imports has declined because the complainants reduced prices in order to regain or retain market share.[70]

  Under U.S. law, the Commission is required to consider whether the volume of imports, or any increase in that volume, either in absolute terms or relative to

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65 ADT-9-79.

66 *Certain Flat-Rolled Carbon Steel Products*, 120, note 290.

67 *Ibid*., 120, note 292.

68 WTO ADA Article 3.2.

69 See *Cold-Rolled Steel Sheet*, (NQ-92-007), and future injury in refined sugar (NQ-95-002).

70 In *Beer* (NQ-91-002), the Tribunal noted:

> "... in response to dumped imports, domestic producers have, at the extreme, two options. They can decide to meet the competition by lowering their prices to maintain their market share. Alternatively they can maintain their prices and surrender market share to the exports. In analyzing this case the Tribunal sees clearly that the B.C. industry has responded by cutting its prices in order to protect market share. For this reason, the dumped imports have had a negative impact on the B.C. industry that is out of proportion to their relatively small share of the market." (7 T.T.R., 278).

production or consumption in the USA is "significant".[71] In *Atlantic Sugar Ltd. v. United States*, the Court for International Trade agreed with the Commission's decision in finding 4.5% market share as being "significant".[72] In *Secondary Aluminum Alloy in Unwrought Form from the United Kingdom*, the Commission found import penetration of 0.2% to be insignificant and incapable of causing material injury.[73] It has, however, noted that the particular level of import volume and market penetration is a matter that has to be considered on a case-by-case basis.[74]In *Erasable Programmable Read Only Memories from Japan*, [75]the Commission found a causal link even though U.S. manufacturers were able to hold and even increase their market share. It was found that this was done at the expense of prices, and that the dramatic decline in prices in the U.S. market had been caused by LTFV imports from Japan.

- **actual and potential decline in market share.** The Tribunal will examine issues related to market share and production very closely to determine whether trends are due to dumping or to other factors. In *Plain Woven Fabrics*, the Tribunal concluded that it was *led to believe that the price competition experienced by Consoltex in the market for fancy fabrics was caused by the conditions prevailing in the market at that time and not by the dumping; ...*[76] In the Commission investigation involving *Certain Tapered Roller Bearings from Japan and Italy*, the Commission concluded that the domestic industry's malaise was attributed to a steep and rapid decline in the market for freight car tapered roller bearings after a phenomenal growth period, and this had a devastating impact on shipments from all participants in the market including the Japanese and Italian exporters.[77] No evidence of price erosion or suppression was presented. Lost sales of the domestic industry were not as a result of lower prices but rather as a result of sourcing preferences.

- **capacity utilization**. Both productivity and capacity utilization were addressed in *Porcelain Insulators*,[78] a rather unique case in the Tribunal's history.

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71 Tariff Act 1930, 771(7).

72 2 CIT 18, 519 F. supp 916 (1981) 2 ITRD 1630.

73 2 CIT 18, 519 F. supp 916 (1981) 2 ITRD 1630.

74 See *Alberta Pork Producers' Marketing Board v. United States*, 11 CIT 563, 669 F. supp 445 (987) 9 ITRD 1129 (Calculating Duty to termination).

75 731-TA-288, USITC Pub. 1927 (December 1986).

76 ADT-11-82.

77 731-TA-120, USITC Pub. 1497 (Feb 1984).

78 ADT-14-84.

- **inventories** appear to be treated in a similar fashion by both the Tribunal and the Commission. See Tribunal decisions on *Custom Steel Wheel Rims,*[79] and *Carbon Steel Plate*. [80]

- **failure to advertise or properly market domestic goods** was relevant to the decision in *Wedding Gowns from the USA* and strikes were important in *Hot-Rolled Steel Sheet* and *Cold-rolled steel*.[81]

- **the impact of low dumping margins on imports**. This is relevant when dumping margins are low (particularly if they are also less than the margin of underselling), the underselling and the injury are not (entirely) explained by dumping and would not be eliminated by the application of antidumping duties. See *Wide Flange Shapes* from Spain, and *Colour TVs*.[82]

- **changes in demand and patterns of consumption.-technological change**

- **consumer preference and quality** These factors have all played a part in decisions by the Tribunal and the Commission over the years, See Tribunal decisions in *Plain Woven Fabric,*[83] and *Expanded Vinyl Coated Knitted Fabrics.*[84] They were also addressed in *Forged Scissors from Italy,*[85] *Ceramic Tiles from Italy* and *Canned Tomatoes from Italy* and *Professional Electric Cutting and Sanding/Grinding Tools From Japan.*[86]

**Causation**

**WTO/GATT**

56. The GATT AD Agreement requires that to justify the imposition of antidumping duties, the injury must be caused by the dumping through the effects of the dumping.

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79 ADT-2-81.

80 ADT-10-83.

81 ADT-5-71 *Finding*; NQ-92-008, *Statement of Reasons*, 19-20; and NQ-92-009, *Statement of Reasons*, 22.

82 ADT-9-83; ADT-3-71.

83 ADT-11-82.

84 ADT-14-83.

85 ADT-9-80.

86 ADT-3-80; ADT-3-78; *Professional Electric Cutting and Sanding/Grinding Tools From Japan*, Investigation No. 731-TA-571 (Final), USITC Publication 2658, July 1993, 11.

**CANADA**

57. The Tribunal gives considerable attention to the causality elements of injury determinations. The most important part of the Tribunal's inquiry is the effort to establish a causal link between any injury that may be found and the dumping which has been found by Revenue Canada. While the Tribunal's causality analysis is found in each of its statements of reasons, one may perhaps learn more about their causal analysis by reviewing their no injury findings. The Tribunal establishes not only a causal link between dumping and injury. It also must find that the injury caused by dumping is material in degree.[87]

58. The threshold of what constitutes material injury is not set out in any precise mathematical formula. Rather, the Tribunal examines the specific situation of each industry which appears before it and makes its assessment based on the general situation of that industry. It is not unusual to find that smaller weak industries tend to be more vulnerable to injury by dumping than larger firms or industries with greater resources. This is why in *key blanks*, the Tribunal concluded that the loss of two accounts could cause material injury to Canadian production.

59. Another factor which may render industries vulnerable to injury from dumping is the existence of fungible commodity-type products which are interchangeable if internationally or nationally recognized product standards or specifications are met.

60. The Tribunal explores the causality linkage in considerable detail at its public hearings. All interested partners may present evidence and test the evidence of those adverse in interest. The depth of the Tribunal's analysis is evident from their numerous Statements of Reasons.

61. In the *large motors*[88] case the Tribunal concluded that

> "In view of the absence of any erosion in the complainants' market share, a lack of import penetration, evidence of lost sales and margin erosion attributable to the dumping and subsidizing, and in view of the lack of any material impact on the complainants' profitability resulting from the dumping and subsidizing, and the absence of any other indicators of injury, the Tribunal concludes that the dumping and the subsidizing of the subject goods have not caused and are not causing material injury to the production in Canada of like goods."[89]

62. In this regard, it should be noted that the Tribunal, while prepared to listen to arguments on precedent, very carefully weighs each factor that may cause or explain injury in every case. They may also attach different weights to individual factors from one inquiry to the next depending on the circumstances of an industry. The Tribunal is not likely to be persuaded with the more existence of statistical evidence of injury if no causal link can be made to dumping. Rather, it weighs each alleged injury factor in the context of its linkage to the dumping and seeks to establish a causal link

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87 See *refined sugar* NQ-95-002.

88 CIT-5-88.

89 T.T.R., Vol. 1 (1990), 88-89.

or nexus between the dumping and material injury. This view was expressed in *colour television sets from Japan* in the following terms:

> "These tables ... do not and cannot by themselves establish a relationship to dumping. Other factors must come into play to establish a causal relationship and it was for this reason that the Tribunal sought evidence of underselling of the domestic product by the dumped product."[90]

**USA**

63. U.S. law sets out the various types of analysis and the factors that are to be used by the Commission to determine whether unfairly traded imports are materially injuring or threatening material injury to a domestic industry and establish if a causal relationship exists.[91] The Commission like the Tribunal is directed to consider the following nonexclusive factors to help it determine the effect of imports on the domestic industry:

- actual and potential decline in output, sales, market share, profits, productivity, return on investments and utilization of capacity;

- factors affecting domestic prices;

- actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and

- actual and potential negative effects on the existing development and production efforts of the domestic industry including efforts to develop a derivative or more advanced version of the like product.[92]

64. The Commission like the Tribunal must evaluate all of these relevant factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. The Commission will not make an affirmative injury determination where other factors unrelated to the importation of the dumped imports account for the injury.. "When determining the effect of imports on the domestic injury, the Commission must consider all relevant factors that can demonstrate if *unfairly traded imports are materially injuring the domestic industry*."[93]

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90 ADT-4-75.

91 Canadian practice and direction is reflected in SIMR s. 37(1).

92 Tariff Act 1930, § 771(7)(C)(iii).

93 October 1993, *Ferrosilicon from Egypt*, Investigation No. 731-TA-642 (Final), U.S. International Trade Commission, Publication 2688, S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987) I-22.

65. However, no Commissioner actually follows the statutory scheme in respect of injury determinations. Indeed, one major departure is the addition of a requirement on the part of several of the Commissioners that the domestic industry show it is injured prior to consideration of the statutory volume, price and consequent effects tests. If there is no injury, then there is no attempt at a causation analysis. Other Commissioners begin their analysis with the statutory volume and price effects tests and go on to attempt to determine whether the dumping itself, rather than the dumped imports, have had material adverse effects on the domestic industry and, if so, then make an affirmative determination. This is consistent with the WTO ADA.

66. Most of the Commissioners now appear to follow a process in which they first determine the condition of the industry. This is then followed by an analysis of the volume and trend of import penetration, and a finally a comparison of import and domestic pricing. If the industry is not healthy, if imports are substantial, and especially if imports are increasing and prices of imports are shown to depress or suppress domestic prices, then it is likely that Commissioners will reach an affirmative result.

67. The initial inquiry into the health of the domestic industry appears to have been sanctioned in practice. Several Commissioners routinely engage in the inquiry. There have been negative determinations that rely exclusively on the determination that the industry was in good health, so there was no material injury that the imports could have caused.[94]

**Dumping Margins**

**WTO ADA**

68. The ADA requires margin analysis be undertaken by the national authorities in determining whether injury is being caused or threatened by dumping.[95] This process is facilitated in both Canada and the United States by the Revenue Canada and Commerce issuing a final "dumping" decision prior to the final investigation and inquiry into the injury question.

**CANADA**

69. The following inquiries review clearly illustrate the Tribunal's approach to this issue. In *Colour Television Sets from Kore*a, the Tribunal noted:

> " the Deputy Minister has already supplied the Tribunal with aggregated material. He has told us that 60 per cent of the goods he investigated were found to disclose no margin of dumping, while 38 per cent did, and the margin of dumping on this 38 per cent was determined to be 4.54 per cent.

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94 See, e.g., *Sewn Cloth Headwear from the People's Republic of China*, Inv. No. 731-TA-405, USITC Publication 2183, (Final) (May 1989).

95 WTO ADA Article 3.4 has included the "magnitude of the margin of dumping" as a clearly designated factor that be examined. A specific change to U.S. law has been made (19 U.S.C.A. § 167). The Tribunal does engage to a limited extent in margin analysis.

> That is all the Tribunal requires to know in the present instance on the question of margins".....[96]

70. The Tribunal went on to conclude:

> "The Tribunal accepts that some measure of injury was inflicted by the relatively low margins of dumping found, but it is of the opinion that the injury cannot be considered material in degree. The success of the Korean product in penetrating the Canadian market is related to factors other than dumping. The Korean manufacturers, operating world-scale plants and with a labour cost advantage, produce the subject goods with a significant competitive edge. Accordingly, for the reasons stated, the Tribunal finds that the dumping has not caused and is not causing material injury to domestic production."

71. Similarly, a no injury finding was made in the *Fabric-Covered, Padded, Wooden Clothes Hangers* based on margin analysis.[97] In this case the evidence indicated, in respect of imports from the U.S., that price reductions had been initiated by the complainant, and therefore any material injury was of its own doing.[98] As for exports from Taiwan, the price difference was such that even if the Taiwanese exporter had raised its prices to a level that was not a dumped price, it would still have been significantly more competitive than the complainant in the marketplace.[99]

72. In *Gypsum Board Originating in or Exported from the United States of America*, where the weighted average margin of dumping was in excess of 27 per cent, the Tribunal expressed the view that, "this is a huge margin of underpricing in a commodity market where even small differences in prices can lead to large shifts in purchases by customers.[100] These cases clearly demonstrate that the margin of dumping is taken into account by the Tribunal in it's findings.

**USA**

73. Congress has neither required or prohibited "margin analysis", namely comparing the size of the dumping margin to the degree of price undercutting or price suppression. "Margin analysis" has been left to the Commissioners' discretion Although the Commission has been conducting injury investigations for decades, there is no consensus among the Commissioners on what would appear to

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96 CIT-13-85.

97 CIT-4-88 *[Note: Refer to Fed. Ct. of Appeal decision]*

98 This appears to run counter to the findings in *soda ash* (ADT-7-83) and 1992/93 flat-rolled steel inquiries, and gypsum board.

99 The Tribunal was remanded by the Federal Court.

100 Inquiry NQ-92-004, (January 20, 1993), 17.

be the crucial question of what is causing the injury.[101] Some Commissioners appear to read the statute literally.[102]

74. Some Commissioners, now in the minority, take a very different approach to the injury test. They attempt to determine whether injury is being caused by the *unfair practice* found by Commerce. Their approach is similar to that traditionally employed by the Tribunal and required by the ADA. These Commissioners attempt to determine what impact the dumping or subsidization found by Commerce has had on the price of the foreign merchandise and determine what the condition of the domestic industry would be if the dumping or subsidization had not occurred. If the domestic industry would have been materially better off in the absence of the dumping, then these Commissioners would make an affirmative determination. The industry need not be at death's door before being entitled to relief. As noted, this view is consistent with the Tribunal's approach.[103]

**Cumulation**

**WTO/GATT**

75. Cumulation has been defined as the aggregation of "volume and price data with respect to imports from two or more countries for purposes of the material injury determination."[104] The WTO ADA permits but does not require "cumulation". It provides that the investigating authorities may cumulatively assess the effects of imports of a product from more than one country that are simultaneously subject to antidumping investigations only if they determine that (a) the margin of dumping is more than *de minimis* ***and*** (b) imports are not negligible and cumulation is appropriate given the competitive situation between the imported products and the domestic product.[105]

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101 *Copperweld Corp., UNR-Learitt, Div. VHR, Inc. et al v. United States et al*, USITR, 12 CIT 148, Slip Op. 88-23, 682 I. Supp. 552 (Feb. 24, 1988).

102 T.A. § 735 19 U.S.C.A. 1673d(B)(1).

103 See for example the CITT decision in the *Certain Corrosion Steel Sheet* (NQ-93-007), where the industry was on the way to a recovery, indeed in public statements by the companies it was indicated that 1994 would be a record year (and it was), and yet the Tribunal found that the domestic industry was entitled to relief to regain in the good times that had lost in the bad times. A similar approach was adopted by the USITC in addressing the same product.

104 *Bingham & Taylor Div. Virginia Indus.* v. *United States*, 815 F. 2(d) 482, 484 N. 4 (Federal Circuit 1987).

105 WTO ADA Article 3.3.

**CANADA**

76. The Tribunal and it's predecessors have tended to examine the impact of dumped imports "en masse" or on a cumulated basis.[106] However, there have been instances in which the Tribunal, in it's injury findings, has excluded certain countries or suppliers from certain countries. In *Alpine Ski Poles* two of four countries found to have dumped were excluded from the finding on the grounds that their contribution to the injury suffered was negligible and that dumping from these sources was not likely to continue.[107]

77. Also relevant is the Tribunal's decision to exclude the USA from the injury finding in *Carbon Steel Plate*. In that case, a majority of the Tribunal was persuaded that the differences between the imports from the United states and those from other countries was such that the injury from the United States should be considered separately from injury from other sources.[108] In the event the Tribunal concluded that the relatively low margins of dumping for U.S. imports would not deter buyers of the types and sizes of plate not available from domestic sources from continuing to source their requirements in the United States. It was the Tribunal's opinion that U.S. carbon steel plate exports, entering Canada under the conditions and price levels noted, are necessary to fill a stable and almost structural type of demand that the domestic mills did not service."[109]

**USA**

78. Since 1984, U.S. law has directed the Commission to assess cumulatively the volume and price effects of imports from two or more countries if such imports compete with each other and with like U.S. domestic products. Prior to 1984, the Commission was not required to cumulatively assess the impact of dumped imports from more than one country for the purpose of making it's material injury determination. Thus, cumulated products could be included in a dumping order even if imports from one country alone caused no injury. The 1988 amendments made cumulation discretionary with respect to negligible imports and in analyzing threat of material injury.

79. In assessing whether imports compete with each other and with the domestic like product, the Commission generally has considered four factors:

- the degree of fungibility between the imports from different countries and the domestic like product, including consideration of specific customer requirements and other quality related questions;

- the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product;

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106 See *Certain Hot-Rolled Carbon Steel Plate* (NQ-92-007) and *Hot-Rolled Carbon Steel Sheet* (NQ-92-008), *Polyphase Induction Motors from Brazil* (CIT-6-85).

107 *Alpine Ski Pole*s [1984] ADT-5-84 (CITT), Statement of Reasons, 9.

108 NQ-92-007.

109 *Ibid.*, 21.

- the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

- whether the imports are simultaneously present in the market.[110]

80. While no single factor is a determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete with each other and with the domestic like product. Further, the Commission generally has cumulated imports even where there were alleged differences in quality between imports and domestic products, although considerations of quality differences are relevant to whether there is a "reasonable overlap" of competition."[111] This has been addressed in many decisions.[112]

81. In the Commission's threat analysis for the final investigation in *Helical Washers from PRC*, they assessed the price and volume effects of helical spring lockwasher imports from China alone. Their decision not to cumulate in the threat analysis was based on the numerous differences between the industries in China and Taiwan and their exports to the USA. For example, by volume and value, imports from China far exceeded those from Taiwan. Further, the imports from China consisted entirely of carbon steel helical spring lockwashers, whereas carbon steel and stainless steel lockwashers accounted for nearly equal shares, by volume, of imports from Taiwan.[113] Furthermore, the Commission concluded that the domestic industry was threatened with injury based on imports from China alone.[114]

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110 *Ferrosilicon From Egypt*, Investigation No. 731-TA-642 (Final), U.S. International Trade Commission, Publication 2688, (October 1993), I-14. [See *Cast Iron Pipe Fittings from Brazil, Korea and Taiwan*, Invs. Nos. 731-TA-278 through 280 (Final), USITC Pub. 1845 (May 1988), *aff'd, Fundicao Tupy S.A. v. United States*, 678 F. Supp. 898 (CIT 1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).]

111 *Ferrosilicon From Egypt*, Investigation No. 731-TA-642 (Final), U.S. International Trade Commission, Publication 2688, (October 1993), I-14, I-15.

112 See e.g., *Flat-Rolled Steel,* USITC Pub. 2664, *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom,* Invs. Nos. 701-TA-319-354 and 731-TA-573-670 (Preliminary), USITC Pub. No. 2549 (August 1992) 44-46; *Silicon Metal from the People's Republic of China*, Inv. No. 731-TA-472 (Final), USITC Pub. 2385, (June 1991) 22-24 .

113 Report I, I-35, 36, Tables 18-23; id., I-37, 38, Tables 24-29. With regard to pricing, the Commission also noted that the import unit values of carbon steel helical spring lockwashers from Taiwan remained well above those of carbon steel imports from China. *Ibid.*, I-29, Table 16.

114 *Certain Helical Spring Lockwashers From The People's Republic of China*, Investigation No. 731-TA-624 (Final), USITC, Publication 2684, (October 1993), I-8.

82. In the recent hot-rolled and cold-rolled steel sheet investigations, the Commission decided, not to cumulate *negligible* countries. The negligible imports exception to this general rule implicitly recognizes that in certain instances, a very small amount of unfairly traded imports from a particular country may have "no discernable adverse impact" on the domestic industry, even though those imports are entering the USA simultaneously with more significant unfairly traded imports from other countries.[115] The statute does not provide a specific numeric definition of negligibility.[116]

### *De Minimis*/Insignificance Standards

### WTO/GATT

83. Article 5.8 of the 1994 AD Agreement provides for the termination of cases where the authorities determine that the margin of dumping or the volume of dumped imports is *de minimis*. *De minimis* (insignificance in SIMA s. 2(1) is defined as being a margin less than 2%, expressed as a percentage of the export price. Volumes of imports from a particular country less than 3% of the like product imports are negligible provided that imports from countries in this category collectively do not account for more than 7% of total imports.

84. In refined sugar, the Deputy Minister noted in the F.D. that imports from these dumping countries could potentially rise to significant levels.

85. The Tribunal did exclude Korea sugar because imports were negligible but declined to exclude several small European suppliers by dumping together all imports from the E.U. rather than the named countries.[117]

### CANADA

86. In Canada, SIMA, until amended by Bill C-57, did not specify a number below which margins and volumes would be regarded as *de minimis*. The norm, however, was probably closer to 5 per cent for total market share, and for margins of dumping. But Customs did not terminate for low margins and, indeed, in multi-company cases did not terminate against companies within who had zero dumping margins. The new WTO levels have been incorporated into Canada's current legislation.

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115 *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*. Investigation Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final). Investigations Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC, Publication 2664, (August 1993), Volume I: Determinations and Views of the Commission, 355.

116 H.R. Rep. No. 40, Part 1, 100th Cong., 1st. Sess. 130 (1987), 131.

117 NQ-95-002.

**USA**

87. The "*de minimis*" standard in the USA, in terms of margin of dumping was 0.5 per cent. The negligible imports rule in the USA, which is used sparingly, permits the Commission to exercise its judgement to exclude countries that have little or no impact. Like Canada, The U.S. has now adopted the levels prescribed in the new AD Agreement. In determining whether imports are negligible, the Commission is required to consider all relevant economic factors including whether:

- the volume and market share of the imports are negligible;
- sales transactions involving the imports are isolated and sporadic; and
- the domestic market for the like product is price sensitive by reason of the nature of the product, so that a small quantity of imports can result in price suppression or depression.[118]

**Threat of Injury**

**WTO ADA**

88. WTO AD Agreement sets out in considerable detail the conditions to be met in determining "threat of injury".[119] Decisions must be based on facts and not on allegation, conjecture or remote possibility, the dumping that is expected to create the injury must be clearly foreseen and imminent. Consideration must be given to a variety of factors such as increased volumes, capacity of the exporter to significantly increase exports, price levels of imports and inventory overhang. The Agreement requires members to decide on the application of antidumping duties in threat situations with "special care".

**CANADA**

89. The Tribunal generally examines the question of threat of future injury very carefully. For example, in the second *bicycles* inquiry, the Tribunal noted:

> "The Tribunal further notes that Taiwan and China, combined, have enormous bicycle production capacity. Many of the facilities in these two countries are designed primarily to serve export markets. Evidence adduced at the hearing shows that a substantial proportion of this capacity, especially in China, is currently idle. This adds to the likelihood that, unless constrained, injurious dumping will continue unabated."[120]

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118 19 U.S.C.A. § 1677(7)(C)(V).

119 Article 3.7.

120 *Ibid.*, 19.

90. In a rare inclusion of parts not sold freely in Canada by the Canadian producers, the Tribunal said:

> "... Future injury findings were made for the components because to do otherwise would have frustrated the finding of material injury on the finished product. The Tribunal considers that the views set forth in those cases are equally applicable to this case insofar as frames are concerned."[121]

91. In refined sugar, the Tribunal explained how it arrived at a threat of injury finding as follows:[122]

> "The magnitude of the net margin depression grew over the last few calendar quarters but, in the Tribunal's opinion, was not yet material. The Tribunal notes that the net margins recovered following the initiation by Revenue Canada of an investigation into dumping and subsidizing of refined sugar on March 17, 1995. The Tribunal is of the view that, without the imposition of anti-dumping and countervailing duties, the downward pressure on net margins exerted by imports of dumped and subsidized refined sugar will resume, bringing net margins down to at least the levels experienced during the latter part of 1994 and the first quarter of 1995. It is obvious that the domestic refiners cannot continue their "zero tolerance strategy" indefinitely. There is a limit to how long the refiners can sustain net margins at these levels. In the Tribunal's view, if the anti-dumping and countervailing duties were not applied, the domestic refiners would quickly lose substantial sales to lower-priced dumped or dumped and subsidized imports. This would lead to reduced production and a smaller market share for the domestic refiners, in addition to the inadequate returns that they would experience. The Tribunal is persuaded that the threat of injury from dumped and subsidized imports jeopardizes the existence of at least one Canadian sugar refinery, as well as the two sugar beet processing plants."

The Tribunal concluded that:

> "... in the absence of anti-dumping and countervailing duties, the threat of material injury to the domestic industry in the form of net margin reductions, reduced profitability, lost sales, reduced production and lost market share is clearly foreseen and imminent."

92. With regard to the issue of “clearly foreseen and imminent”, the Tribunal noted the following in *Iceberg Lettuce*

> "imminence" must relate to the likelihood of injurious dumping affecting B.C. lettuce producers in the next year or so, and not at any time over the five-year period which would be covered by a finding of material injury. The chance of the 1993 crop year being as difficult as the 1991 crop year is

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121 *Ibid.*, 21.

122 NQ-95-002.

> probably no more than one in five. While the first three years of the 1988-92 period were at best mediocre for the B.C. lettuce industry in terms of profits, and worse in terms of market share, the industry appeared to be adjusting to the pressures. For instance, it was attempting to regain market share and reduce the price discounts it had to give relative to the landed price of U.S. lettuce by switching to the Salinas variety of Iceberg lettuce. The fifth year, 1992, was profitable overall, despite the low production of the B.C. industry. Indeed, prices rose throughout the summer. By the time the preliminary determination of dumping went into effect at the end of July, and antidumping duties began to be collected, market forces had driven U.S. prices and hence B.C. prices, net of duties, to levels which were very profitable for B.C. producers."[123]

**USA**

93. The statute directs the Commission to determine whether an industry in the USA is threatened with material injury by reason of imports "on the basis of evidence that the threat of material injury is real and that actual injury is imminent." Their decision "may not be made on the basis of mere conjecture or supposition."[124] The Commission is required to consider the following criteria:

> (I) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States;
>
> (II) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level;
>
> (III) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;
>
> (IV) any substantial increase in inventories of the merchandise in the United States;
>
> (V) the presence of underutilized capacity for producing the merchandise in the exporting country;

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123 Canadian International Trade Tribunal, Decisions and Review Findings, *Fresh Iceberg (Head) Lettuce Originating in or Exported from the United States of America*, Inquiry No. NQ-92-001, November 30, 1992, 19.

124 19 U.S.C.A. § 1677(7)(F)(ii). An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." Metallverken Nederland B.V. v. U.S., 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990), citing American Spring Wire, 8 CIT at 28, 590 F. Supp. 1280.

(VI) any other demonstrable adverse trends that indicate probability that importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury;

(VII) the potential for product shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s)

(VIII) in any investigation under this title which involves imports of both raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under § 705(b) (1) or 735(b) (1) with respect to either the raw agricultural product or the processed agricultural product (but not both); and

(IX) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.[125]

94. In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry.

[125] 19 U.S.C.A. § 677(7)(i).

## XVI. ENFORCEMENT/ADMINISTRATIVE REVIEWS

1. There are important differences in the enforcement of AD injury findings between Revenue Canada and Commerce. Revenue Canada's approach is prospective, transparent and predictable. Commerce determines actual duty liability on a retrospective basis, impose uncertain potential liabilities on importers and no predictability. Because the preponderance of steel transactions are between related parties, and this pattern is repeated in other sectors, this uncertainty and exposure to potential but unmeasurable liability has serious implications for Canadian exporters.[1]

### Imposition of Provisional Duties

2. An affirmative Preliminary Determination (P.D.) is the basis for the imposition of provisional duties. These normally may not be in place for more than 120 days.[2] Definitive duties may be imposed only after an affirmative finding of material injury or threat of material injury.[3] Both the USA and Canada impose provisional duties or deposits on imports during the provisional period.[4] Revenue Canada estimates these provisional levels. In both countries, it is not unusual for margins in the Final Determination (F.D.) to differ from those in the P.D.[5]

### CANADA

3. The Deputy Minister, Revenue Canada estimates preliminary dumping margins which are translated into provisional duties or deposits.[6] Revenue Canada clarifies any uncertainties remaining at P.D. during the period between the Preliminary and Final determinations. They may also receive additional submissions or clarifications from both co-operative and non-co-operative firms after the P.D. Because the final duties imposed cannot be higher than provisional duties collected or for

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[1] There are fewer AD investigations initiated by the USA against Canada than by Canada against the USA. However, because the U.S. is a larger market and Canadian firms tend to be more export dependent than their American counterparts, the impacts on Canadian exporters are still great.

[2] ADA Article 7.1 - a preliminary determination of dumping is required as well as a determination that injury would be caused without the imposition of duties.

[3] The Tribunal changed its standard of also requiring a "threat" finding even when injury had been caused in *caps, jars and lids* (NQ-95-001).

[4] The period between the P.D. and the definitive determination of injury (affirmative or negative).

[5] In Canada, a negative P.D. of dumping terminates proceedings. However, in the USA, a negative preliminary determination of dumping does not terminate the investigation, but provisional duties are not imposed because dumping has not been found.

[6] While SIMA makes a number references to the Deputy Minister taking specific actions, this means authorities under the Act are delegated to senior officials of the Department.

which a security bond is posted, there is a belief that this provides an incentive to Revenue Canada to estimate higher margins of dumping at the P.D. However, in reality, the P.D. may increase or decrease at Final.

4. Whenever possible, Revenue Canada will establish specific normal values for the provisional period. If the exporter sells at or above these normal values, no antidumping duties will be collected. As noted, the exporter has the option of not increasing his export prices and the importer can pay the provisional duties or post a bond to cover potential liability. Selling at normal value during the provisional period will put more money in exporters' pockets but there will be no duties paid thus nothing to refund to the importer if there is a negative injury finding. Nor would there be any anti-dumping duty to drawback if the dumped imported input is eventually used in an exported product.

**USA**

5. Exporters to the USA are often forced by their customers to be importer of record. The U.S. Customs service and Commerce operate a very burdensome retrospective system of enforcement. The importer must post a bond for the estimated dumping duty. Periodic administrative reviews are conducted on request, which examine each shipment during a one year period.[7] There will be an assessment of duties against each entry which may result in a refund or an additional collection. This procedure is described in more detail below.

**Definitive Duties**

6. Revenue Canada and Commerce both apply definitive duties from the determination of material injury. If there is a finding of injury, Revenue Canada will often apply the normal values or deposit rates established at the F.D. until they can complete a review under SIMA s. 55. In Canada exporters can raise their prices to undumped levels, removing the need to pay antidumping duties.[8] Commerce does not establish prospective normal values and thus deposits have to be paid. Bonds are not accepted by Commerce after the determination of injury.

7. Commerce conducts administrative reviews usually annually. Commerce determines the adequacy of the dumping deposits paid at the time of entry of the goods into the USA through a *retrospective* analysis of dumping. The importer will be entitled to a refund if dumping has been eliminated or reduced by increased export prices (or in some cases reduced home market prices or a

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[7] 19 U.S.C.A. § 1675.

[8] Some Canadian petitioners argue that the normal value system enables importers to *avoid* paying antidumping duties. Actually, Revenue Canada permits exporters to raise their prices to undumped levels which eliminates the need to collect duties. It does not permit them to *evade* antidumping duties because when export prices are at or above normal values, none are exigible. The imposition and collection of AD duties, or the establishment of normal values under SIMA is *remedial not punitive*. *Selling at normal value eliminates dumping and injury caused by the dumping.* Revenue Canada normally conducts annual reviews of each finding and may do so more frequently, for example if there is a general price increase in the exporting country.

combination of the two). However, if dumping has intensified, the importer will find that there is a liability for additional antidumping duties and this can be substantial.

8. Following an affirmative injury finding, Revenue Canada conducts a review under SIMA s. 55 which must be completed within 180 days of the injury determination. This review determines the precise liability for all imports during the provisional period. As this period is usually about six months more current than the period used for the P.D. and F.D., Revenue Canada, when issuing their SIMA s. 55 results, will issue new normal values or duty deposits for each exporter.

**Ongoing Enforcement**

**CANADA**

9. CSPA considers that the Canadian system of enforcement is not as effective as the U.S. system. While Revenue Canada practice tends to be less burdensome, it does force prices to rise to undumped levels. SIMA is designed to provide relief to Canadian producers without unduly burdening their customers. The future certainty it provides is important to Canadian industrial users. Antidumping laws should eliminate the injury due to dumping, not close markets.

10. The primary objective of the Canadian system is to eliminate injury due to dumping by collecting offsetting dumping duties when the export price is less than the normal value.[9] Normally, Revenue Canada concentrates on providing the exporter with the information necessary to eliminate dumping (which generally results in a price increase to offset injury). In the circumstances, the exporter will receive additional revenue per unit - and this may even result in increased focus on the Canadian market because of improved profitability.[10] This, of course, depends on the price-sensitivity of the product and the magnitude of the margin of dumping. Sales at normal value are not dumped. SIMA provides no recourse against undumped imports.

11. Until the ladies footwear investigations in 1989, Revenue Canada's method of setting deposit rates was more onerous than the U.S. system. Commerce, when setting its deposit rates, will not give credit for so-called negative dumping margins or overselling. However, it does give credit for non-dumped shipments. The dumping is expressed as a percentage of the export price for all goods examined. So, in the USA, where 50% of the goods examined were dumped by 25%, expressed as a percentage of the export price of the dumped shipments, and 50% were not dumped, one would likely see a reported dumping margin of 12.5% expressed as a percentage of export price.

12. Before *Ladies Footwear*, if Revenue Canada's investigation revealed that 50% of the goods were dumped and the margin of dumping was 20%, expressed as a percentage of normal value (or

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[9] SIMA s. 2(1) and s. 3(1) a.

[10] It is not unusual for an importer to persuade an exporter with imperfect knowledge of the Canadian or U.S. markets that prices must be substantially lower than are actually necessary to compete. It is rarely necessary to be more than 5% below Canadian prices particularly for commodity products and greater discounts simply leave money on the table that the exporter need not give away. Once exporters learn they can compete normal value, they soon raise their prices.

25% expressed as a percentage of export price). If Revenue Canada establishes duty advances rather than normal values, port officers would be instructed to apply a duty of 25%, as a percentage of the export price to all importations.

13. This approach was much more restrictive than Commerce's methodology for calculating margins and deposit rates and resulted in the collection of duties that was greater than warranted by the actual level of dumping.[11] Under a prospective normal value system, normal values are set on the undumped basis. Exporters and importers should not be penalized because circumstances do not permit the administering authority to follow favourable and predictable enforcement methods.

14. In the *Ladies Footwear* several exporters had dumping margins on only a small portion of their shipments. For example, there were exporters who had dumping margins in the 10% range on 10% of their shipments with no dumping on the remaining 90%. Revenue Canada agreed that applying a 10% margin to all shipments would be excessive, and instead used Commerce's methodology, which resulted in the collection of a 1% duty on all imports.

15. During the SIMA s. 55 reviews in the *Flat-Rolled Steel Case*, Revenue Canada in fact used Commerce's methodology for calculating advances but not their enforcement methods. Exporters were offered the option of maintaining the "advance methodology" in lieu of immediate reinvestigation to establish normal values.

16. Although Revenue Canada generally establishes normal values that permit the exporter to raise prices in order to eliminate dumping and remove the need for payment of antidumping duties, this may not be practical in some cases. For example, when there are many products that change frequently, such as in the high fashion ladies footwear business, Revenue Canada may collect a dumping "advance" based on the weighted average dumping margin during the most recent administrative review.

17. In situation where export price advances are imposed, Revenue Canada does not retroactively impose additional antidumping duties unless the exporter has failed to report a major change in circumstance or there has been fraud. Where the dumping duties are paid by way of an "advance" and the importer considered the advance to be excessive, each importation would need to be appealed to Revenue Canada in order to obtain a refund. If the importer's position is shown to be correct, excessive duties would be refunded. However, by appealing an entry, the importer is inviting Revenue Canada to reappraise it - and there is a potential liability for the imposition additional AD duties (i.e., in addition to the "advance"). So appealing Revenue Canada's rulings creates the same potential liabilities as under Commerce's retrospective system.

[11] It was correct to impose 25% on the products that were dumped to that extent but totally unwarranted in terms of the Code and Canadian law to apply *any* duty at all to those products that were not dumped.

**USA**

18. Enforcement methodologies and the related administrative reviews are the most significant difference between the Canadian and U.S. systems. Commerce operates a retrospective enforcement regime. U.S. Customs collects deposits in the amount of estimated dumping. Commerce conducts very extensive administrative reviews of each importation which may result in refunds of deposits or additional collections well after the goods have been sold and used. There is considerable uncertainty and the administrative reviews are very onerous as duty liability must be calculated for each importation. Commerce requirements, in an administrative review are very burdensome for exporters, particularly those who are also importer of record. Because there is a potential liability or refund for each unliquidated entry, all entries must be examined - and domestic selling experience provided. Revenue Canada, on the other hand, reviews over somewhat shorter time period[12] in order to update normal values (and to determine whether previous imports have been properly valued and paid for). The much greater volume of exports to the larger U.S. market also adds to the burden of a Commerce review.

19. Commerce lifts AD bonding requirements only after 3 years of a proven absence of dumping. The only way to get an antidumping duty lifted is:

1. to stop exporting to the USA or charge substantially higher prices in the USA than in all other markets; and then

2. to request three subsequent annual reviews.

20. The retrospective nature of the Commerce system tends to create considerable uncertainty as it is difficult to predict the ultimate liability without extensive and continuing monitoring. Canadian exporters are very directly affected by enforcement because in many cases, they must act as non-resident importers, selling to their American customers on a landed duty-paid basis. Therefore, in these situations the exporter bears the risks of future assessments.

21. The WTO ADA requires that administrative reviews be completed more expeditiously, with some beneficial effect on reducing the duration of uncertainty and exposure to liability. However, Commerce intends to use different methodology in reviews than in the original investigation (e.g., averaging methodology which could increase the scope for finding dumping).

22. The differences between reviews and investigations were addressed in a note from Deputy USTR Ira Shapiro to Acting House Ways and Means Chairman Robert Matsui[13] which are summarized below.

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[12] Profitability analysis may require analysis over a one year period increasing the burden and cost of compliance.

[13] Letter from Ira Shapiro to Hon. Robert Matsui (June 30, 1994) reprinted in *Inside U.S. Trade*, Special Report, (July 15, 1994), S-4.

**Price Averaging**

23. The WTO ADA specifies exceptions to weighted average/weighted average and transaction/transaction methodology which would permit the comparison of weighted-average foreign market prices with individual transaction prices to the U.S. in certain circumstances. The Administration held that the ADA does not require average-to-average comparisons in later reviews conducted for purposes of determining duty assessment rates. The Administration claims this was the result of a careful compromise worked out by U.S. negotiators during the Uruguay Round. U.S. counsel also note that this is the only way dumping liability can be determined for each transaction.

24. On this point the ADA does speak of averaging "during the investigation phase". This appears to support the U.S. argument. However, Canada disputes the U.S. position.

25. Mr. Shapiro advised Rep. Matsui that:

> "The Department of Commerce intends to continue its present practice in reviews of comparing a weighted-average foreign market price with the prices of individual sales to the U.S. This results in no unfairness to the producer or exporter, who already is on notice that its sales are under scrutiny for dumping and should be aware that it must set its prices more carefully.
>
> The USTR view is that the primary purpose of an investigation is to determine *whether* dumping is taking place. Thus, a dumping margin calculated in an investigation only serves as a basis for later collections of precise dumping duties determined in later reviews. In a review, however, Commerce must measure the amount, if any, by which sales are dumped with more precision and accuracy. This can be better accomplished by avoiding average-to-average comparisons that can mask real dumping."[14]

**Duty as a Cost**

26. Duty as a cost is a highly complex issue. It would be a radical departure from long-standing U.S. law. The Administration believes that treating antidumping duties as a cost would be inconsistent with the WTO ADA under the U.S. retrospective system.[15] The Administration was not persuaded that there was a widely recognized problem that would warrant an amendment that would lead to an arbitrary doubling of duties.

27. The pre-WTO Antidumping Regulations on reimbursement of antidumping duties did not distinguish between related and unrelated importers. They simply require certification that the

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[14] *Ibid.*

[15] WTO ADA Article 9.3.3 requires that, in a review (to determine reimbursement, of constructed export prices) related party transactions, authorities "should calculate the export price with no deductions for the amount of antidumping duties paid".

importer has not been, nor will be, reimbursed by the exporter for any antidumping duties which may be assessed.[16]

28. The fact that regular customs duties are treated as a cost in antidumping calculations is not justification for treating dumping duties as a cost in such calculations. Regular duties are a cost known before or at importation and are a cost separate from and independent of whether dumping exists. Antidumping duties are not known or knowable at the time of importation and their existence or size depends upon a myriad of factors

> "some of which, including possible changes in construction of the law, methodological changes, exchange rate changes, and comparison models, cannot reasonably be known by the exporter or importer at that time".[17]

29. Rep. Norman Y. Mineta wrote to House Ways and Means Acting Chairman Sam Gibbons opposing the change and advising that:

> "This is not merely a technical amendment but rather a fundamental change to the basic standard by which dumping determinations are made, a change which could lead to unfair increases in dumping margins. The result would be increased prices for imported goods and component parts, and an increased risk of retaliation against U.S. companies abroad."[18]

30. However, while Congress did not make AD duty a cost, they wanted to ensure that AD duty absorption was not rewarded. The Conference Agreement stated:

> "... two years after the issuance of an antidumping order and in a five year review involving an importer that is related to an exporter, commerce will examine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order. Commerce will inform the ITC of its findings regarding duty absorption and the ITC will take those findings into account in its five year sunset injury review. The SAA would explain that these provisions are meant to deter affiliated importers from absorbing duties and clarify that an affirmative determination of duty absorption would have prohibitive value at the ITC with respect to whether the producer or exporter continues to absorb duties at the time of the sunset review. This provisions is not meant to provide for the treatment of antidumping duty as a cost (Articles 2.4 and 9.33).[19]

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16 19 CFR § 353.26(b)(1995).

17 Shapiro Matsui letter.

18 Mineta Letter on ESP, *Inside U.S. Trade*, (September 2, 1994), 17.

19 "*GATT Conference Craft New Language on Fair Comparison Fight*", *Inside U.S. Trade*, Special Report, (September 23, 1994), S-3.

31. Revenue Canada always deducts both an amount for profit which the importer may not be able to control and antidumping duty which is treated as a cost.[20] They appear to consider that under a normal value system, related parties who sell at normal values should not be disadvantaged because others do not. Further dumping, for any reason, is reported to the Tribunal in a SIMA s. 76 review. Evidence of dumping for any reason[21] during the review period may result in the Tribunal finding a propensity to dump.

32. Even if Revenue Canada imposes a duty advance over export price rather than establishing normal values, these duties will be seen as evidence of a propensity to dump.[22]

**Retroactivity**

**GATT/WTO**

33. The Massive Dumping/Critical Circumstances provisions permitting retroactive duties flow from a provision in the Kennedy Round Code originally introduced at Canada's insistence. Rodney Grey explains that:

> "The final exception to the rule that duties may be levied retroactively in relation only to dumped imports that have caused injury and that entered after the date on which provisional measures applied is in the case of so-called "sporadic" dumping. The Canadians had been concerned that the Code should enable them to deal effectively with sudden large-scale dumping that might do great damage to Canadian producers. It was believed that there was a particular risk of this in the textile and garment trades. The proximity of U.S. producers and marketing centres to Canadian centres and the ease with which business could be transacted between American merchants and Canadian importers make it particularly attractive for producers in the United States to dump excess merchandise in Canada. The quantity that might be exported could be quite small in relation to the U.S. market; in the smaller Canadian market, it could be injurious. Early in the negotiation it was agreed that this problem was real - if not of economic importance - and that, while it might not now occur between countries other than the United States and Canada, it might develop in Europe and therefore should be provided for in the Code."[23]

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20 SIMR s. 22. and SIMA s. 25.

21 Including exchange rate movements, or the imposition of unavoidable AD duty advances.

22 See, for example, the reasons SIMA s. 76 reviews *waterproof rubber footwear* (RR-92-001).

23 Grey Testimony to the Commons, 57-58.

34. The WTO ADA states, in part, that antidumping duties and provisional measures shall only be applied to products if:

> "... the authorities determine:
>
> a) either that there is a history of dumping which caused injury *or* that the importer was, or should have been, aware that the exporter practices dumping and that such injury would cause injury, *and*
>
> b) that the injury is caused by massive dumped imports of the product in a relatively short period which in light of the timing and volume of dumping imports and other circumstances (such as a rapid build-up of inventories of the imported product), is likely to seriously undermine the remedial effect of the definitive antidumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.[24]

35. The retroactivity period is limited to 90 days prior to the date of the P.D. and no duties may be levied on imports prior to the initiation of the investigation was initiated.

36. The wording in WTO ADA Article 10.6 is clearer than it was in the Tokyo Round A.D. Code.[25] The Kennedy Round AD Codes spoke of a recurrence of injury which caused the Tribunal considerable difficulty in deciding whether invocation was necessary or appropriate.

## CANADA

37. The Tribunal has declined to impose retroactive duties on a number of occasions. In *Drywall Screws from France*, the Tribunal majority stated that "the retroactivity provisions are [to be] limited to sporadic dumping, that is to say, massive importations which may, or may not recur rather than situations of "continuous" dumping."

38. However, a different Tribunal panel imposed retroactive duties in *Photo Albums* from Indonesia, Thailand and the Philippines. The following justification was provided by the majority of the panel:

- imports from the subject country accounted for 91 per cent of imports and captured 24 per cent of the market;
- the Deputy Minister found that those importations were dumped by considerable margins of dumping.[26]

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[24] Article 10.6.

[25] Article 11.1.

[26] Member Trudeau dissented.

39. The majority concluded that the retroactive duty 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 dumped goods from subject countries but also the switching "*en masse*" of those importations to other dumped sources. By the imposition of retroactive antidumping duties on importers, this provision of SIMA imposes a penalty to discourage the importers from switching sources to defeat the purpose of SIMA.[27]

40. Member Trudeau did not agree with the majority for a number of reasons, which he presented in a carefully argued dissent. He noted, *inter alia*, that while imports had taken a 24 per cent market share, the complainant had lost only 6 per cent. Further there was no evidence that any importer had stockpiled. He could not make a linkage between the material injury and a series of importations that were massive.[28] His thinking appears to be closer to the requirements of the WTO ADA.

**USA**

41. If Commerce determines preliminarily that there are critical circumstances, i.e., circumstances requiring retroactive application of antidumping duties for 90 days prior to the P.D., it makes an order suspending liquidation and refers the matter to the Commission for a determination of "whether retroactive imposition of antidumping duties on the merchandise appears necessary to prevent recurrence of material injury that was caused by massive imports of the merchandise over a relatively short period of time."[29] An affirmative critical circumstances determination is a finding that, in the absence of retroactive application of the antidumping order, the surge of imports that occurred after the case was filed but within the 90-day period prior to Commerce's preliminary determination, will prolong or cause a recurrence of material injury to the domestic industry.[30]

42. The Commission on receiving an affirmative finding of critical circumstances from Commerce must determine whether the imports in question are likely to seriously undermine the remedial effect of the antidumping order to be issued.[31]

43. In deciding this matter, the Commission is required to consider among other factors it may consider relevant:

- the timing and volume of the imports;
- a rapid increase in the inventory of the imports; and
- any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined.[32]

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27 NQ-90-003, 15.

28 *Ibid.*, 19.

29 19 U.S.C.A. § 1673 d(3).

30 *Certain Helical Spring Lockwashers From The People's Republic of China*, Investigation No. 731-TA-624 (Final), USITC Publication 2684, (October 1993), I-14, I-15.

31 19 U.S.C.A. § 1673 d(b)(2)(A)(i).

44. The retroactive imposition of duties is punitive in Canada as it is in the USA. The practice has not been invoked as often in Canada as it was in the USA, due largely to the vagueness of the Tokyo Round Code and its transposition into Canadian law. There has been no experience with "massive" dumping rules under SIMA as amended to reflect the WTO ADA.

**Frequency of Reviews (Sunset Clause)**

45. The WTO ADA contains an important new provision requiring review of a finding within 5 years of its making. This was an important objective in the Uruguay Round negotiations for Canada and a number of other countries.[33]

46. The relevant provisions of the ADA are:

> "11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive antidumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately.
>
> 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive antidumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or reoccurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." [34]

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[32] *Ibid.*,. § 1673 d(b)(4)(a)(ii).

[33] Government of Canada, Department of Foreign Affairs and International Trade, Canada and the Uruguay Round (1994).

[34] WTO ADA, Articles 11.2 and 11.3.

**CANADA**

47. The Tribunal may, at any time, initiate a review on its own initiative, or at the request of the Deputy Minister or any other person or government.[35] The Tribunal may as a result of this review make an order rescinding the order or finding or continuing with or without amendment.[36]

48. Canada has required sunset clause reviews since SIMA came into force on December 10, 1984. The relevant provision of SIMA states:

> "(5) Where the Tribunal has not initiated a review pursuant to subsection (2) with respect to an order or finding before the expiration of five years after,
>
> (a) if no order continuing the order or finding has been made pursuant to subsection (4), the day on which the order or finding was made, or
>
> (b) if one or more orders continuing the order or finding have been made pursuant to subsection (4), the day on which the last such order was made,
>
> the order or finding shall be deemed to have been rescinded as of the expiration of the five years."[37]

49. The Tribunal has explained its approach to reviews in a number of inquiries. For example, in *Carbon Steel Plate*, the Tribunal stated:

> "In our view, it is clear from the foregoing provisions *that there are no specific limits on the duration of a finding*. (emphasis added) It is incumbent on the Tribunal to examine each case on its own merits and to decide, based on the evidence, whether circumstances warrant continuing or rescinding the finding. If this examination leads to the conclusion that there is an ongoing risk of injurious dumping, then the finding should be continued. If not, the finding should be rescinded."[38]

50. However, the Tribunal has extended findings for reasons that arguably could not be used in determining injury under a SIMA s. 42 injury inquiry. For example, in *Tillage Tools*, in the second review of a threat finding originally made in December 1983, the Tribunal noted:

> "The present review is the second review of the subject 1979 and 1982 findings... After reviewing the evidence in this case, we are of the view that the risk of dumping and the susceptibility of the industry to such dumping is

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35 SIMA s. 76(2).

36 *Ibid.*, s. 76(4).

37 *Ibid.*, s. 76(5).

38 RR-89-006.

> still present to an extent that warrants a further continuation of the finding without amendment.".[39]

51. The standard that the Tribunal appears to apply is not necessarily whether renewed dumping would cause material injury in the conditions envisaged in the ADA. Rather, it assesses the vulnerability of the industry to renewed dumping.[40] There are a number of Tribunal AD findings which have been extended, some twice since the sunset clause entered into force. Examples are:

- *OCTG* (CIT-15-85)
- *waterproof rubber footwear* (ADT-4-79)
- *tillage tools* (ADT-11-83)
- *Paint brushes* (ADT-6-84).

**USA**

52. Until the URAA, the United States did not have a "sunset clause" for antidumping findings. The institution of an investigation did not affect the petitioner's burden of persuading the Commission that the alleged changed circumstances in fact exist. The 1984 amendments to § 751 of the *Tariff Act of 1930* support the Commission's conduct of T.A. § 751 reviews. The 1984 amendments added the following sentence to T.A. § 751:

> "During an investigation by the Commission, the party seeking revocation of an antidumping or countervailing duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping or countervailing duty order".

53. While the Commission now must initiated reviews within 5 years of a finding[41] (or the entry into force of the WTO),[42] the burden of proof remains with the party requesting the review. The Conference report accompanying this provision stated that "the purpose of § 751 review is to determine whether there are changed circumstances sufficient to warrant revocation of an antidumping order." Further, the report notes that "a § 751 review does not begin from an entirely

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[39] CIT-09-88; Article 18.3 of the WTO ADA requires that the provisions of the Agreement shall apply to investigations and reviews of existing measures initiated on or after acceptance.

[40] *Waterproof Rubber Footwear Originating in or Exported from Czechoslovakia, Poland, the Republic of Korea, Taiwan, Hong Kong, Malaysia, Yugoslavia and the People's Republic of China*, Decisions and Review Findings, (RR-92-001), (October 21, 1992), 7.

[41] 19 U.S.C.A. § 1675(c)1.

[42] 19 U.S.C.A. § 1675(c)6a and 63. Reviews must begin within 42 months of entry into force to the WTO and be completed within 60 months. Canada adopted the view that reviews need only be initiated prior to the end of the 5 year period, a more restrictive interpretation than under U.S. law.

neutral starting point. *The party seeking revocation of the order has a burden of persuasion*, (emphasis added) in the sense that at the end of the Commission investigation, the Commission must be convinced that revocation of the order is appropriate.[43]

54. There are some important constraints imposed on the Commission in sunset reviews. For example:

- they must take account of duty absorption between related parties;[44]
- the Commission shall consider that the effects of revocation (or termination of a suspension agreement) may not be imminent but may manifest themselves over a longer period of time.[45]
- the Commission has much greater flexibility in reviews of regional industry findings[46] than the Tribunal chose to exercise in their review of *beer*.[47]

55. While the Commission is given much direction on this issue, both in the law and in the SAA, it has been my experience that since SIMA s. 76 entered into force, most of the directives to the Commission parallel practices and conclusions of the Tribunal. It remains to be seen how the Commission will apply the WTO ADA and U.S. legislative provisions in practice. This will not be clear until 1999 or 2000.

56. Congressional direction is designed to ensure that a finding will continue if there is evidence of continued dumping or the situation of the industry has not improved.[48] Actual Commission practice in sunset reviews must be monitored closely.

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43 *Liquid Crystal Display Television Receivers from Japan*, Determination of the Commission in Investigation No. 751-TA-14 Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, USITC, Publication 2042, (December 1987), 4-5.

44 19 U.S.C.A. § 1675a(a)(i)D.

45 *Ibid.*, § 1675a(a)5.

46 *Ibid.*, § 1675(a)(a)8.

47 RR-94-001, December 2, 1994.

48 Boltuck and Litan, *Down in the Dumps*, 178.

**ANNEX A**

## NUMBER OF INQUIRIES TO REVENUE CANADA BY YEAR SINCE SIMA 1984

| | * |
|---|---|
| December 1984 - March 31, 1985 | 24 |
| April 1, 1985 - March 31, 1986 | 62 |
| April 1, 1986 - March 31, 1987 | 65 |
| April 1, 1987 - March 31, 1988 | 53 |
| April 1, 1988 - March 31, 1989 | 42 |
| April 1, 1989 - March 31, 1990 | 43 |
| April 1, 1990 - March 31, 1991 | 33 |
| April 1, 1991 - March 31, 1992 | 35 |
| April 1, 1992 - March 31, 1993 | 69 |
| April 1, 1993 - March 31, 1994 | 32 |
| April 1, 1994 - March 31, 1995 | 28 |
| April 1, 1995 - March 31, 1996 | 29 |
| | 515 |

## NUMBER OF CASES INITIATED SINCE SIMA

| | | % Initiated |
|---|---|---|
| December 1984 - March 31, 1985 | 6 | 25.0 |
| April 1, 1985 - March 31, 1986 | 18 | 29.0 |
| April 1, 1986 - March 31, 1987 | 16 | 24.6 |
| April 1, 1987 - March 31, 1988 | 14 | 26.4 |
| April 1, 1988 - March 31, 1989 | 10 | 23.8 |
| April 1, 1989 - March 31, 1990 | 11 | 25.6 |
| April 1, 1990 - March 31, 1991 | 8 | 24.2 |
| April 1, 1991 - March 31, 1992 | 8 | 22.9 |
| April 1, 1992 - March 31, 1993 | 12 | 17.4 |
| April 1, 1993 - March 31, 1994 | 8 | 25.0 |
| April 1, 1994 - March 31, 1995 | 5 | 17.9 |
| April 1, 1995 - March 31, 1996 | 4 | 13.8 |
| | 120 | 23.0 |

* Represents all inquiries for which case numbers were requested but does not mean that the case was necessarily a properly documented complaint.

Above totals include both dumping and countervailing investigations.

# COMPARISON OF DEPARTMENT OF COMMERCE AND REVENUE CANADA QUESTIONNAIRES IN (ORIGINAL) STEEL INVESTIGATIONS

This appendix compares and analyzes the data requirements of the U.S. Department of Commerce ("Commerce") and Revenue Canada with respect to antidumping questionnaires for original investigations. Enforcement or administrative reviews are addressed in Chapter XVI.

It has been alleged that the DOC questionnaire in an antidumping investigation is much more onerous than the comparable Revenue Canada questionnaire. We have therefore followed the DOC questionnaire format from beginning to end and have identified the comparable data requirement in the Revenue Canada questionnaire.

As a general comment, it must be pointed out that the substantive information required a calculate normal values cannot be very different as between Canada and the United States as both countries use home market sales and/or cost of production as a basis of calculation normal values (this observation does not hold true with respect to the calculation of normal values using sales to third countries as Revenue Canada does not use this method).

The information requested by each administering authority is similar. The main differences are that the DOC questionnaire is much more specific as to the information requested and the format in which it must be provided. The DOC questionnaire also explains in detail what the information will be used for.

The Commerce questionnaire explains what each piece of information will be used for in the calculation of normal values this is not done in the Revenue Canada Questionnaire.

For example, the DOC question A1(a) seeks information regrading the volume and value of sales during the Period of Review ("POR")

1. to the U.S.
2. in the home market; and
3. in each of the three largest third country markets.

The DOC questionnaire explains how this information will be used over three pages and provides a format for completing the question.

The Revenue Canada questionnaire mirror question (A14) simply states:

> State the total quantity and value of like goods that you have sold during (i) 199X, and (ii) during the first 6 months of 199X:
>
> (a) in your domestic market;
> (b) to importers in Canada;
> (c) to importers in other countries other than Canada.

So while the detail and format requirements of the DOC appear more onerous our conclusion is that Revenue Canada requests substantially the same information. Explanations and formats provided may assist an unsophisticated exporter. Revenue Canada provides no guidance.

**General Instructions**

With respect to response time DOC gives only 10 days for submission of the general information section but 45 days for all other parts. Revenue Canada, operating under shorter statutory time frames, allows 37 days for filing of the complete response. DOC "tries" to take foreign holidays into account. We have found that Revenue Canada in practice is receptive to representations about short extensions.

The DOC also issues deficiency questionnaires. Revenue Canada now does this more frequently. Pre-WTO, DOC generally used a 6-month period of investigation (P.O.I). Now they normally use one year. Revenue Canada has been known to change the period of investigation in mid-stream[1] but has generally allowed additional time to prepare responses.[2]

DOC requires a consolidated response from related exporters/importers. Revenue Canada has separate questionnaires for exporters and importers. Recently, Revenue Canada decided not to issue a detailed importer questionnaire unless the importer is not operating at arm's length from the exporter or there is a reason to suspect a compensatory arrangement.[3]

DOC requires an original and six copies of responses. Revenue Canada requires an original and one copy for investigations handled out of Ottawa and an additional copy when co-ordination is undertaken through their offices in Brussels and Tokyo. The cost of reproduction is more significant for respondents to DOC questionnaires.

DOC requires replies in English. If respondents expect Revenue Canada to be able to address their submission in a timely way, they must file it in English or French - and provide translations of third language documents. Revenue Canada has in several investigations advised Brazilian exporters that they require translations from Portuguese into English or French. Revenue Canada also hires translators in certain investigations and have locally engaged staff in Tokyo who act as translators. Translation is a heavy, time-consuming burden. Both Canadian and U.S. exporters are experiencing the joys of responding to Mexican questionnaires in Spanish.

The U.S. system which is much more structured and legalistic than the Canadian requires a certification by the providers of the information and Counsel that they have read the submission and attest to its accuracy. Failure to do so will result in rejection of the response at filing. Revenue Canada does not have the same requirement but they do require that if a party is represented by counsel, such counsel must be authorized in writing by the party to make submissions on behalf of their client.

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1 In *preformed fibreglass pipe insulation*, Revenue Canada extended the P.O.I. by six months between issuing the questionnaire and the filing date for the questionnaire response. Then at P.D., Revenue Canada used only sales in the last 2 months of the extended month investigation period, when dumping margins were greatest.

2 Revenue Canada is now bound by SIMA and the WTO ADA to a period of not less than 6 months but normally one year.

3 A routine part of Revenue Canada's verification process is to ensure that the Canadian importer has paid for the imports and has paid a price consistent with what is shown on commercial invoices and that the credit terms indicated have been met. This verification includes tracking invoices through journal and ledger entries and verification of bank statements and usually obtaining a copy of the relevant payment instrument.

The DOC questionnaire is much more specific in its instructions about how to prepare non-confidential summaries. Commerce requires public disclosure of trends or rough approximations of values. This degree of detail is not required by Revenue Canada. Revenue Canada's requirements regarding designation of confidential information are less structured - indeed there are no formal formatting requirements. However, Revenue Canada will determine on a case by case basis whether or not the edited non-confidential version is adequate and will frequently seek additional disclosure, particularly if a petitioner requests it.

DOC includes a copy of the statute and regulations with the questionnaire. Revenue Canada practice in this regard is irregular.

The DOC ***General Instructions*** section explains *"Each section includes an explanation of what information we need, why we are requesting it and the questions themselves in narrative form"*. With few exceptions, Revenue Canada does not explain why they need the information they are requesting. Revenue Canada's questionnaire provides a number of instructions in its general section which DOC may address in the context of specific questions.

DOC provides more detailed instructions than Revenue Canada about how to deal with related party transactions - perhaps because their questionnaire is, for related companies, both an exporter and an importer questionnaire.

The DOC questionnaire makes it clear that if an exporter sells to an unrelated party in its home market and is aware the product will be ultimately destined for the USA, then this is considered a sale to the USA. The Canadian questionnaire does not address this situation directly in the questionnaire but if this situation existed, it would be examined at verification. If an exporter to Canada knew that the product was destined for Canada, even if sold to an independent third party in the exporting country, they could not include this in their comparable domestic sales response.[4]

While the Period of Investigation (P.O.I.) is specifically defined, DOC requires that respondents report shipments arising out of such sales after the P.O.I.[5] Revenue Canada addresses export shipments during the P.O.I. but requires information on home market sales from the first date of sale for a shipment during the P.O.I.[6]

Filing of responses on computer tape is mandatory for DOC. Revenue Canada does not insist on this but now normally requests the data on computer diskette. Both DOC and Revenue Canada are now disciplined by the relevant provisions of the WTO ADA.

Paragraph 9 of the DOC's general instructions suggests filing worksheets and source documents to expedite verification. Revenue Canada does not but does not discourage such filings. Including these documents can expedite the verification process. Revenue Canada's process is not as methodical as DOC's appears to be. This tends to lead to a reluctance on the part of some but not all Revenue Canada

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4 The Canadian investigation focuses on sales where the ***exporter*** (respondent) is the exporter of record.

5 DOC may also seek information about sales after the filing response and before the P.D. - which may be the subject of a supplementary request for information. Revenue Canada does not.

6 This can result in providing home market sales data for 6-8 months prior to the P.O.I.

verifiers to provide advance indication as to what they intend to verify. This can make verification disorganized and time consuming. However, both the WTO ADA (Appendix 1) and the SIMA Handbook require pre-verification advice of areas of concentration.

The data requested by the two countries in antidumping/administrative review investigations is reviewed below.

The Revenue Canada questionnaire contains four parts:

> **Part A** requests basic information concerning the exporter, its products, affiliates, manufacturing process and its domestic and export markets.
>
> **Part B** requests information concerning the exports of the subject goods to Canada during the period of investigation.
>
> **Part C** requests information concerning the domestic sales of like goods. Information is requested on a monthly basis.
>
> **Part D** requires the provision of specific financial and cost of production data for all exported products and like domestic products.

The Commerce questionnaire contains five sections:

> **Section A** requests information about the organization and accounting practices, and general information regarding sales of the merchandise under review.
>
> **Section B** requests information about the home market, or where appropriate, a third-country market, including a sales list and other information necessary to calculate the normal value of the merchandise.
>
> **Section C** requests information about the United States market, including a sales list and other data necessary to calculate the price in or to the United States market.
>
> **Section D** requests information about the **cost of production** of merchandise sold in the home or third-country market and the **constructed value** of merchandise sold in or to the United States which may be required in connection with the calculation of normal value.
>
> **Section E** requests information about further manufacturing or assembly in the United States prior to delivery to unaffiliated United States customers.

There may be some difficulty in understanding that information may be required for periods other than the period of review.[7]

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[7] Commerce uses POR and Revenue Canada uses POI to indicate the time period being investigation. For this appendix, the Revenue Canada term POI is used for both.

**Question A1 - Quantity and Value of Sales**

Commerce question A1 is mirrored by Revenue Canada question A14. The difference, as noted above, is that the DOC questionnaire provides a detailed explanation of how to respond.

**Question A2 - Corporate Structure and Affiliations**

This section is mirrored by Revenue Canada questions A1 to A8. Two differences are that Revenue Canada requests corporate publications; Commerce does not. Commerce requests shareholder lists while Revenue Canada does not. However, if there were some doubt as to control or affiliation, Revenue Canada would conduct a thorough examination of corporate records and minute books.[8]

**Question A3 - Distribution Process**

This question is mirrored in the Revenue Canada questionnaire at questions B1 to B4 for export sales and C1 to C3 for domestic sales.

**Question A4 - Sales Process**

The Sales Process question is a much more detailed examination how sales are effected within each distribution channel (a more detailed Question A3). There is no comparable detailed examination of the selling process in the Revenue Canada questionnaire. This information would typically be provided in response to questions B1 to B4 of the Revenue Canada questionnaire. If normal values are going to be calculated pursuant to section 15 of SIMA at least half a day of verification will normally be spent reviewing how sales are made, including tracking relevant documentation.

**Question A5 - Sales to Affiliated Persons ("Affiliates") in the Comparison Market**

This section examines the functions performed by Affiliated Persons ("Associated Persons" in SIMA) in the country of export. There is no comparable section in the Revenue Canada "Exporter Questionnaire". Revenue Canada seeks this information directly from the related importer in **Part B** of the "Importers Questionnaire".

**Question A6 - Accounting/Financial Practices**

There is no Revenue Canada version of Question A6(a) but a detailed explanation of accounting practices is required at verification.

Question A6(b) is mirrored by Revenue Canada question D1.

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[8] This occurred more than once in electric polyphase induction motors (1-200 H.P.) from Brazil.

Question A6(c) is not part of the standard Revenue Canada questionnaire. If, however, an economy is hyper-inflationary Revenue Canada may modify the questionnaire to ensure that additional information required is provided to permit proper assessment. Inflation accounting methodology, and if relevant inflation indices, are addressed in great detail at verification. Revenue Canada seeks independent advice from international accounting firms located in the exporting country about such matters.

**A7 - Merchandise**

The section is mirrored by questions A12 and A13 in the Revenue Canada questionnaire. The Commerce questionnaire requests more detailed information, specifically the key to all product codes. In our experience, if a company uses product codes invariably this information will be requested by Revenue Canada at verification and should be offered with the initial filing to help Revenue Canada to understand the coding. We generally provide it with the initial response as it facilitates and expedites verification.

**A8 - Further Manufacture or Assembly in the U.S.**

This question is dealt with in Revenue Canada Importers questionnaire in Part B.

**A9 - Exports through Intermediate Countries**

There is no specific comparable question in the Revenue Canada questionnaire. However, if an exporter wishes to obtain normal values for a good which is transhipped they will need to ensure that questionnaire responses are provided for the initial exporter, the importer/exporter in the third country and the importer in Canada. Revenue Canada does ask about costs incurred after shipment from the country of export, and activities undertaken or services performed by third parties.

**Section B - Sales in the Home Market or to A Third Country**

This section in the Commerce questionnaire requests information similar to that requested by Revenue Canada domestic sales listing. As with Section A, the Commerce questionnaire format is used as a benchmark with Revenue Canada requirements provided for purposes of comparison.

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 1.0 | Complete Product Code | Revenue Canada requests a separate spreadsheet for each product for each month. |
| 2.0 | Matching Control Number | This is not required in the spreadsheet but is requested in question C1. |
| 2.1 | Overruns | Not Requested. |
| 2.2 | Prime vs. Secondary Merchandise | Not requested. Revenue Canada requires that secondary merchandise be costed as prime. Therefore, unless secondary goods are sold at above fully absorbed cost (a rarity), secondary and primary goods will have the same normal value. |
| 3.1 through 5.1 | Product Characteristics | As noted above, Revenue Canada requires a different spreadsheet for each product where in the product must be described in full. |
| 6 | Customer Code | Customer Name (as a practical matter, customer codes and names will be accepted interchangeably by Revenue Canada where the codes are defined). |
| 7 | Customer Relationship | Revenue Canada requires that sales to associated persons be excluded from the Domestic sales listing. |
| 8 | Customer Category | Revenue Canada requires that sales reported be to the same trade level as the importer or in the absence of such sales the nearest and subsequent trade level. |
| 9 | Channel of Distribution | Revenue Canada requires that exporters report sales to the same trade level as the importer or in their absence the nearest and subsequent trade level. |
| 10 | Date of Sale | ate of Sale. |

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 11 | Sale Invoice Number | Invoice Number. |
| 12 | Sales Invoice Date | Invoice Date. |
| 13 | Date of Shipment | Date of Shipment. |
| 14 | Date of Receipt of Payment | Revenue Canada requests average collection days for domestic receivables in C6. At verification, they will seek and obtain information on payments for individual sales. |
| 15 | Terms of Delivery | Terms of Shipment. |
| 16 | Terms of Payment | Question C14 regarding cash discounts |
| 17.1 | Quantity | Quantity * |
| 17.2 | Quantity Unit of Measure | Must be indicated. |
| 17.3 | Quantity Type | Quantity * |
| 17.4 | Weight Conversion Factor | Quantity * |
| 17.5 | Converted Quantity | Quantity * |
| | | * Revenue Canada requires that all quantities be converted and reported in actual weight however they might be sold. |
| 18 | Gross Unit Price | Unit Selling Price |
| 19.1 | Early Payment Discounts | Discounts |
| 19.2 | Quantity Discounts | Discounts - Revenue Canada asks for explanations of the nature of discounts and rebates. |
| 20 | Rebates | Discounts |
| 21 | Level of Trade Adjustments | Revenue Canada requests information necessary to calculate the trade level adjustment at question C8 but does not ask that it be put in the spreadsheet. |
| 22 | Inland Freight - Plant/Warehouse to Customer | Delivery Costs |

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 23 | Pre-Sale Warehouse Expense | Delivery Costs - These may be segregated, and will be addressed at verification. |
| 24 | Inland Freight - Plant/Warehouse to Customer | Delivery Costs |
| 25 | Inland Insurance | Delivery Costs or may be shown separately. |
| 26 | Destination | Delivery Costs |
| 27 | Commissions | This information is requested in question D6. |
| 28 | Selling Agent | This information is requested by Revenue Canada and would be examined in detail at verification if an agent was used. |
| 29 | Selling Agent Relationship | This information is requested by Revenue Canada in the questionnaire and would be examined in detail at verification if an agent was used. |
| 30 | Credit Expenses | Revenue Canada requests average collection days for accounts receivable at question C6 and the calculation of interest expense at D5. |
| 31 | Interest Revenue | This is requested in the calculation of interest expense at D5. |
| 32 | Post-Sale Warehousing Expense | This information is requested in the Revenue Canada questionnaire. As normal values are typically calculated on an ex-factory basis such expenses if incurred, must be reported. |
| 33 | Advertising Expenses | This information is requested in the calculation of GS&A at D4. |
| 34 | Warranty Expense | This information is requested in the calculation of GS&A at D4. |
| 35 | Technical Service Expense | This information is requested in the calculation of GS&A at D4. |
| 36 | Royalties | This information is requested in the calculation of GS&A at D4. |
| 37.1-37.n | Other Direct Selling Expenses | This information is requested in the calculation of GS&A at D4. |

| | Commerce | Revenue Canada |
|---|---|---|
| 38 | Indirect Selling Expenses | This information is requested in the calculation of GS&A at D4. |
| 39 | Inventory Carrying Costs | Revenue Canada does not specifically request this information but may request and analyze at verification. |
| 40 | Packing Cost | Revenue Canada requires this information with respect to export sales when the cost is different from for domestic sales. This is an issue frequently addressed at verification. |
| 41 | Variable Manufacturing Cost | This information is requested in question D5. |
| 42 | Manufacturer | This information is requested in question B13. While Commerce requests the name of the manufacturer and will seek information from the manufacturer, Revenue Canada requires a full paper trail of all transactions with the manufacturer and a separate questionnaire response from the manufacturer providing details of cost of production. |
| 43 through 50 | Additional Fields for Third-Country Sales | These fields are all related to third country sales. As Revenue Canada does not use third country sales in the calculation of normal values this information is not required. The only request relating to third countries is in the questionnaire (A-14). |

**Section C - Sales to the United States**

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 1.0 | Complete Product Code | Revenue Canada requests a separate spreadsheet for each product for each month. |
| 2.0 | Matching Control Number | Not Requested. |
| 2.1 | Overruns | Not Requested. |
| 2.2 | Prime vs. Secondary Merchandise | Not requested (Revenue Canada requires that secondary merchandise be costed as prime). |
| 3.1 through 5.1 | Product Characteristics | As noted above, Revenue Canada requires a different spreadsheet for each distinct product. The product must be described on each spreadsheet and detailed specification sheets catalogues and brochures are requested at A12, B9 and C16. |
| 6 | Sale Type | Not Requested. |
| 7 | Customer Code | Customer Name (as a practical matter, customer codes and names will be accepted interchangeably by Revenue Canada where the codes are correlated to names). |
| 8 | Customer Category | Revenue Canada requires that the trade level of the Canadian customer be identified. |
| 9 | Channel of Distribution | Revenue Canada requires details of the channels of distribution for export sales. |
| 10 | Date of Sale | Date of Sale. |
| 11 | Sale Invoice Number | Invoice Number. |
| 12 | Sales Invoice Date | Invoice Date. |
| 13 | Date of Shipment | Date of Shipment. |

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 14 | Date of Receipt of Payment | Revenue Canada request average collection days for domestic receivables in C6. Terms for export sales are requested. Payment of individual export sales are fully tested and documented at verification. |
| 15 | Terms of Delivery | Terms of Shipment. |
| 16 | Terms of Payment | This information is requested at question C14. |
| 17.1 | Quantity | Quantity * |
| 17.2 | Quantity Unit of Measure | Quantity * |
| 17.3 | Quantity Type | Quantity * |
| 17.4 | Weight Conversion Factor | Quantity * |
| 17.5 | Converted Quantity | Quantity * |
| | | * Revenue Canada requires that all quantities be converted and reported in actual weight however they may be sold. |
| 18 | Gross Unit Price | Unit Selling Price |
| 19 | Early Payment Discounts | Discounts |
| 19.3-19.n | Other Discounts | Discounts |
| 20 | Rebates | Discounts |
| 21 | Inland Freight - Plant/Warehouse to Customer | Delivery Costs |
| 22 | Pre-Sale Warehouse Expense | Delivery Costs |
| 23 | Inland Freight - Plant/Warehouse to Customer | Delivery Costs |
| 24 | Inland Insurance | Delivery Costs |
| 25.0 | Brokerage and Handling | This is requested at B6(a)(9) when the expense is included in the selling price. |
| 26.0 | International Freight | This is requested at B6(a)(14) when the expense is included in the selling price. |

| | Commerce | Revenue Canada |
|---|---|---|
| 27.0 | Marine Insurance | This is requested at B6(a)(15) when the expense is included in the selling price. |
| 28.0 | U.S. Inland Freight from Port to Warehouse | This is not specifically requested but as a matter of course would be required if the expense was incurred by the exporter. If this expense is incurred by the importer, it must be reported in the importer questionnaire. |
| 29.0 | U.S. Inland Freight from Warehouse to the Unaffiliated Customer | This is not specifically requested but as a matter of course would be required if the expense was incurred by the exporter. If this expense is incurred by the importer, it must be reported in the importer questionnaire. |
| 30.0 | U.S. Inland Insurance | This is not specifically requested but as a matter of course would be required if the expense was incurred by the exporter. If this expense is incurred by the importer, it must be reported in the importer questionnaire. |
| 31.0 | Other U.S. Transportation Expense | This is not specifically requested but as a matter of course would be required if the expense was incurred by the exporter. If this expense is incurred by the importer, it must be reported in the importer questionnaire. |
| 32.0 | U.S. Customs Duty | Revenue Canada requests information about *all* duties included in the selling price. |
| 33.0 | Destination | This information is requested in B1. |
| 34.0 | Duty Drawback | Revenue Canada routinely requests details of internal taxes or customs duties subject to remission or drawback. |
| 35.0 | Commissions | This information is requested at B6(b)(ii). |
| 36.0 | Selling Agent | This information is requested at B5. |
| 37.0 | Selling Agent Relationship | This information is requested at B5. |

| | **Commerce** | **Revenue Canada** |
|---|---|---|
| 38.0 | Credit Expenses | This is not requested by Revenue Canada in this questionnaire. During Verification Revenue Canada requests proofs of payment from the export sales listing. They determine the typical payment period for each importer from the sample and then compare this to the average collection days for domestic accounts receivable (Question C6), if there is a discrepancy, and the difference in credit terms is more than 30 days, an adjustment will be made to export price. |
| 39.0 | Interest Revenue | This information is not requested by Revenue Canada on a transaction by transaction basis but aggregate data is requested in question D5. |
| 40.0 | Post-Sale Warehousing Expense | This information is not specifically requested but as a matter of course would be required if the expense was incurred by the exporter. |
| 41.0 | Advertising Expenses | This information is requested in response to question D4. |
| 42.0 | Warranty Expense | Revenue Canada requests this information only when there are differences between the warranty for domestic and exported goods (D7(c)). Even if the respondent reports no difference in domestic and export warranty, the warranty account is examined at verification. |
| 43.0 | Technical Service Expense | This information is requested in question D4. |
| 44.0 | Royalties | This information is requested with respect to domestic sales but not with respect to export sales. As a practical matter where a royalty expense incurred in the production of subject goods, it would be treated as a cost of production. |
| 45.1-45.n | Other Direct Selling Expenses | This information is requested in D4. |
| 46.1 | Indirect Selling Expenses Incurred in the Country of Manufacture | This information is requested in D4. |

| | Commerce | Revenue Canada |
|---|---|---|
| 46.2 | Indirect Selling Expenses Incurred in the United States | If these expenses are incurred by the exporter the information is requested in D4. If the expenses are incurred by a related importer the information is requested in the importers questionnaire at B12(b)(iv). |
| 47.1 | Inventory Carrying Costs Incurred in the Country of Manufacturer | If these expenses are incurred by the exporter the information is requested in D4. If the expenses are incurred by a related importer the information is requested in the importers questionnaire at B12(b)(iv). |
| 47.2 | Inventory Carrying Costs Incurred in the United States | If these expenses are incurred by the exporter the information is requested in D4. If the expenses are incurred by a related importer the information is requested in the importers questionnaire at B12(b)(iv). |
| 48.0 | Packing Cost | This information is requested in B6(b)(i). |
| 49.0 | U.S. Repacking Cost | This information is requested of related importers in the importers questionnaire at B4. |
| 50.0 | Variable Manufacturing Cost | This information is requested in D3. |
| 51.0 | Total Manufacturing Cost | This information is requested in D3. |
| 52.0 | Further Manufacturing | This information is requested of related importers in B12(b)(iii) of the importers questionnaire. |
| 53.0 | Foreign Trade Zone | This information is not specifically requested by Revenue Canada. However, Revenue Canada would verify the tax/duty liability of an exporter in a bonded processing zone very carefully. The basic information would be required in response to the duty/tax drawback remission question. |
| 54.0 | Manufacturer | This information is requested in question B10. |

| | Commerce | Revenue Canada |
|---|---|---|
| 55.0 | Entered Value | This information is not requested specifically. Revenue Canada relies on the export price, as adjusted to bring it back to an ex-factory price. |
| 56.0 | Importer | Revenue Canada requires a separate export sales listing for each importer. |

**Section D - Cost of Production**

## I General Explanation of Section D

Revenue Canada does not have comparable explanatory section.

## II General Information

A. Products and Production Process

This information is requested by Revenue Canada in questions A9 through A11 and D3.

B. Financial Accounting Systems and Policies

There is no parallel to this question in the Revenue Canada questionnaire. These issues would be addressed at verification but always in the same degree of detail requested by Commerce. However, following the Commerce approach will tend to save time, and provide a better understanding for verifiers.

C. Cost Accounting Systems and Policies

This information is requested by Revenue Canada in question D3(a) and (b). While Revenue Canada does not request the level of detail required by Commerce in their initial questionnaire, these matters are examined in-depth at verification. The Commerce approach should facilitate verification.

## III Response Methodology

A. Description of Response Methodology

This information is requested in question D3(c)(i) to (vi) of the Revenue Canada questionnaire.

B. Inventory Cost Reconciliation

This information would be included in the financial data and plant operating statements required by Revenue Canada.

## IV Instructions for Submitting COP and CV Data Files

Revenue Canada did not mandate a format for the submission of cost data in the steel cases. They have done so in other investigations, i.e., ***tufted carpets*** from the U.S.

Revenue Canada uses cost modules prepared in consultation with petitioners. These modules are used to identify divergence from the norm and to focus verification on such departures. This permits Revenue Canada to use their time effectively.

## Section E - Cost of Further Manufacture or Assembly Performed in the U.S.

This section has no equivalent in the Revenue Canada exporter questionnaire. This information is requested in the related importer's questionnaire. If an importer is related to an exporter, Revenue Canada will conduct an investigation of sales to unrelated parties in Canada pursuant to SIMA s. 25(c) to determine the reliability of the export price. This very extensive investigation seeks to determine whether the importer has covered all of his costs and resold the goods to an unrelated party at a profit. If these conditions are not met, Revenue Canada will increase the margin of dumping in an original investigation. In an administrative review, additional antidumping duties could be exigible.

**ANNEX C**

# REVENUE CANADA'S PRELIMINARY DETERMINATION OF DUMPING IN HYUNDAI

By Peter Clark

There has been much controversy over Revenue Canada, Customs and Excise's preliminary determination (P.D.) in cars exported by or behalf of Hyundai Corporation. The statement of reasons in support of Revenue Canada's P.D. is very clear and very detailed. It suggests Customs tried to play the investigation strictly by the book. It does not suggest arbitrariness other than the use estimates required because of inadequate co-operation.

If the Customs' reasons accurately record the investigation, it might be concluded that if Hyundai ended up with a higher preliminary dumping margin than they might have otherwise it was in part, their own fault.

Customs appears to have tried to act fairly in this case. The immediate referral by the Deputy Minister, to the Tribunal for a decision on injury was in our view an indication that he may have had some concerns about the quality of the injury data or the novel approach to injury adopted by petitioners. However, the Tribunal's injury test at the Preliminary Injury stage is not a high threshold test. It is our perception that the Tribunal tends to allow the petitioner to go through the process unless the complaint is devoid of any reasonable evidence of injury. At this stage the evidence required is prima facie evidence. But a preliminary injury finding by the Tribunal does not ensure a final affirmative determination.

It is crucial in SIMA actions recognize the importance of early and detailed attention to the preliminary Customs investigation. Because Hyundai is such a complex case, this became even more important. Indeed Revenue Canada recognized the complexity of the case by extending the period of investigation from 90 to 135 days.[1]

Revenue Canada conducted two verification visits at the exporter's premises in Seoul, each lasting for a week. They also did back-up verification at Hyundai Canada over a 10 day period. Such extensive verification procedures are unusual. Still Customs referred to delays in the investigation which prevented them from verifying all information submitted, particularly costs.[2]

It is essential in these investigations to co-operate with Customs. The Department is for the most part, prepared to accept arguments by exporters for favourable adjustments if they based on sound evidence and financial data. They are particularly attentive to cost allocation methodology. They must also be convinced that the allocation and costing is consistent with accounting practices and principles in the country of export. If an exporter does not co-operate with Customs, or refuses to or is not able to produce supporting evidence, Customs will rely on the best information available.[3]

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1 RCCE, Preliminary Determination Cars from Korea, (P.D.) Statement of Reasons, File 4264-41, November 24, 41 at 2.

2 P.D. at 3.

3 See SIMA 29(1) Customs in fact "estimates" at preliminary determination. They estimate using the information available -- at the time the estimate is made - SIMA 38(a)ii. Section

Customs did a great deal of estimating at the P.D. in Hyundai. However, it appears from the Statement of Reasons supporting the Preliminary Determination that may not have had much choice.

Customs noted, for example, that:

> **"it was determined that Hyundai's method of allocating costs to production shops was such at to result in a substantial shift in the costs of the Excel models to the Pony, Stellar and other models."[4]**

This means that Customs were not satisfied with Hyundai's allocation methods so they did their own. This probably resulted in higher in margins than if Hyundai's allocations had been proven to be acceptable.

The Department also notes:

> **"since the outset of the investigation, the Department has maintained that propane vehicles are not comparable to the gasoline powered vehicles shipped to Canada. Propane vehicles require substantially different equipment (carburetor, fuel system and emission system) than gasoline vehicles. Therefore sales of propane vehicles have not been included for purposes of establishing normal values."[5]**

It would appear that Hyundai considered that propane vehicles would offer a more favourable comparison to their export models (leading to lower dumping margins). Customs, however, normally look for the most comparable model.

The Department concluded, "**that all domestic sales of Presto and Excel models have been deemed to be unacceptable"**[6], because they were sold at prices which did not reflect recovery of what the Department estimated to be fully absorbed cost. This is normal Customs practice.

Customs does not accept that sales at less than full cost "are in the normal course of trade". Indeed, the statute precludes them from taking account of home market sales "at prices which do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit".[7]

Customs had this to say about quality and material adjustments in the normal value calculation.

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29 is reserved for final determinations.

4 P.D. at 4.

5 P.D. at 5.

6 P.D. at 6.

7 SIMA 16(2)b

> **"Therefore, adjustments for qualitative differences were computed under regulation 5(a) in determining normal values. The qualitative difference varied by model and by the time period. The adjustment on a weighted average basis for the combined sales of the Pony and Stellar was an upward adjustment."**

This means that the estimated cost of production for export models was higher than for domestic models. This increases the normal value.

Customs also found

> **"the warranty associated with export sales was found to be of a greater duration. Therefore, an upward adjustment to the price of like goods was made pursuant to regulation 5(b) to take into account this warranty difference. The adjustment, on a weighted average basis, for the combined sales of the Pony and Stellar resulted in an upward adjustment."**[8]

This means that the extra cost of warranty incurred on exports increased the normal value. Once again, this is normal Customs practice.

Hyundai did not provide adequate detail about domestic credit costs.[9] Customs deemed them to be cash sales (a bit arbitrary). The added the cost of credit on the export sales to the normal value. This was done pursuant to regulation 5(d). If Hyundai can provide credit information by the Final Determination, the margins may be reduced.

Customs noted inter alia, in respect of manufacturing cost data:

> **"the exporter's submission was subjected to an intensive audit and as a result, major areas relating to the cost of production were found to be deficient and inaccurate."**[10]

> **"The costs presented by HMC were found to be unreliable."**[11]

> **"Costs presented in some instances were not actual costs but rather reflected prices expected to be negotiated in the future."**[12]

> **"The costs shown on the bill of material for parts sourced from the same supplier were different for domestic and for export models in some instances. The explanations provided were not conclusive."**[13]

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8 P.D. at 7.

9 P.D. at 7

10 P.D. at 8

11 P.D. at 8

12 P.D. at 8

13 P.D. at 8

> **"HMC did not provide data which would allow the estimation of variances between standard and actual costs."[14]**
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> **"No information was provided to demonstrate that the components acquired from related suppliers reflected fully absorbed costs."[15]**

This latter point is important for an integrated company like Hyundai. Customs will not accept acquisition cost of parts and materials purchased from related suppliers at less than cost.

Customs went on to note:

> **"HMC allocated costs over all models without regard for the fact that costs, in many instances, were maintained separately for the different models. In one instance, costs incurred were predominantly for the Excel but were allocated over production costs of all vehicles. Therefore, it appeared that these costs were being shifted from the Excel to other models."[16]**

Clearly Customs took a hard look at allocations. It is not unusual for exporters to try to rationalize their allocations in a way which will minimize dumping margins. And, it may be consistent with Korean accounting practice to allocate in this way in respect of certain GS&A expenses.

Customs also noted:

> **"No start up costs were provided in spite of several requests and only limited information was available on preproduction costs. HMC believed these costs were not relevant because they were incurred prior to the period of review. Pursuant to regulation 11, such costs must be considered as part of the cost of production."[17]**

Customs is correct in their interpretation of Regulation 11. When an exporter refuses to provide information, they are forcing Customs to use the best information available. This raises questions about how Customs actually estimated these costs. Often it is on the basis of information provided by petitioners.

Hyundai may have some defenses based on Korean accounting standards. Deferred development expenses in Korea "carried in the balance sheet at the year-end preceding the fiscal year of the effective date of the Standards should be amortized within 5 years, beginning with the fiscal year of the effective date."[18] These standards also note that "pre-operating costs should be amortized at an

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14 P.D. at 8.

15 P.D. at 8.

16 P.D. at 9.

17 P.D. at 9.

18 Financial Accounting Standards in Korea, Chapter IX, Addendum 1, Note 3.

equal amount each fiscal year within 3 years starting from the fiscal year of the start of operations."[19]

Customs also considered that:

> **"Sufficient information was not provided for technical assistance and training and spare parts royalties, resulting in an understatement of royalty costs."[20]**

We must assume that Customs used some method of estimating the understatement of royalty costs. As noted, they normally rely on information supplied by petitioners. This would probably have only a minor influence in the calculation but it would raise the normal value.

Customs then expresses concerns about allocation of depreciation. The P.D. states:

> **"Depreciation was spread over all production with no regard given to the equipment requirements of the different models and the concomitant depreciation expenses. This distorts expenses as a model with a higher standard labour rate is allocated more depreciation, e.g. the Pony is allocated more depreciation than the Excel."[21]**

Customs' judgment on this subject may be wrong. They may not be taking account of practices which may be acceptable in Korea. However, it is not evident from the Korea accounting standards we have consulted whether or not Hyundai's methods are consistent with normal Korean practice.

All of the deemed deficiencies in Hyundai's submission led to the conclusion that: **"HMC's costing system does not appear to reflect actual costs."[22]**

This is Customs' cover for using estimates. Hyundai was also forced into a constructed cost mode because Customs concluded:

> **"Profitable sales of other like goods cannot be used to determine normal values as it is impossible to make the appropriate quality adjustments pursuant to regulation 5 due to the lack of verified cost information. It is also not possible to estimate normal values pursuant to paragraph 19(b), again due to the lack of verified costs."[23]**

The increases in normal values were exacerbated by reductions in the export price. SIMA provides that the export price is the lesser of the amount paid by the importer or received by the exporter.[24] Customs reduced the export price paid by Hyundai Canada, which resulted in widening the margin of dumping because they determined that:

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19 Ibid., Article 98:2.

20 P.D. at 9.

21 P.D. at 9.

22 P.D. at 9.

23 P.D. at 9.

24 SIMA, Section 25.

> **"The review of the reliability of the export prices by model indicated that the selling prices were not sufficient to absorb all costs and expenses incurred by HACI on the sales in Canada of the subject goods and an amount equal to the industry profit on sales in Canada of goods of the same general category, during the July, 1986, to December, 1986 period."[25]**

and concluded:

> **"Since the export prices of the subject goods were deemed to be unreliable, export prices were estimated pursuant to paragraph 25(c) of the SIMA."[26]**

Customs determined that Hyundai Canada did not earn a profit in Canada. Because we are dealing with related companies, this results in an adjustment (downward) to selling price to a level which would permit Hyundai Canada to cover all costs plus a 7.6% profit.[27]

In calculating the profit margin, Hyundai Canada should have earned, Customs concluded:

> **"The weighted average amount for before-tax profit on sales in Canada by Canadian vendors during the period of review was found to be 3.32%."[28]**

This is a more liberal approach than Customs has used in other cases where they employ a 7.6% minimum profit.[29]

Revenue Canada was not as restrictive with Hyundai as they have often been in other cases.

If Hyundai provides the information required by the Department, there could be a significant downward movement in the margins. Customs, in the P.D., notes the following possibilities:

> **Regulation 5(d) - Terms and Conditions of Sale**
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> The regulation 5(d) adjustment to normal value does not reflect domestic credit activity. An adjustment reflecting the above would decrease the margin of dumping.[30]

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25 P.D. at 11.

26 P.D. at 11.

27 SIMA Regulation.

28 P.D. at 11.

29 SIMA Regulation --

30 P.D. at 12.

**Regulation 9 - Trade Level**

In the case of expenses relating to payroll benefits, no adjustment was allowed because the portion of the expenses related to direct selling could not be isolated from the overall payroll and benefit expenses. An adjustment reflecting the above would decrease the margin of dumping.[31]

**Regulation 10 - Drawback of Taxes and Duties**

HMC, provided documentation which indicates that some components, which are sourced outside of Korea and are introduced into the exported cars, are subject to drawback of Customs taxes and duties. However, no evidence was provided to the Department to substantiate that the like goods which are sold domestically in fact contain these same components and that the costs of the import taxes and duties are reflected in the domestic selling prices.[32]

**Regulation 4 - Quantity Adjustment**

We believe the adjustment which might be considered is one that would result from reductions in selling and distribution costs were HMC to sell to large distributors in Korea of a size equivalent to HACI.[33]

**Expenses Incurred by Hyundai Corporation**

However, no information regarding HC's expenses was provided or obtained during the verification exercise.[34]

**Allocation of HACI's GS&A Expenses**

Hyundai Auto Canada Inc. did not provide suitably documented information supporting the allocation of advertising and incentive program expenses to specific models.[35]

The onus is on Hyundai, particularly the Korean exporter, to be more co-operative with Revenue Canada, if they wish to obtain a reduction in the dumping margins in the final determination.

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31 P.D. at 28.

32 P.D. at 13.

33 P.D. at 13.

34 P.D. at 13.

35 P.D. at 13.