

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230405

Docket: A-52-21

Citation: 2023 FCA 74

**CORAM: GAUTHIER J.A.
RIVOALEN J.A.
ROUSSEL J.A.**

BETWEEN:

**CANADIAN HARDWOOD PLYWOOD AND VENEER
ASSOCIATION, COLUMBIA FOREST PRODUCTS, ROCKSHIELD
ENGINEERED WOOD PRODUCTS ULC and HUSKY PLYWOOD (A
DIVISION OF COMMONWEALTH PLYWOOD COMPANY
LIMITED)**

Applicants

and

**ATTORNEY GENERAL OF CANADA , LINYI CELTIC WOOD
CO., LTD., CELTIC CO., LTD., LINYI EVERGREEN WOOD CO.,
LTD., LINYI HUASHENG YONGBIN WOOD CO., LTD., LINYI
JIAHE WOOD INDUSTRY CO., PINGYI JINNIU WOOD CO.,
LTD., PIZHOU JIANGSHAN WOOD CO., LTD., SHANDONG
GOOD WOOD IMP. AND EXP. CO., LTD., XUZHOU SHENGPING
IMP AND EXP CO., LTD., XUZHOU LONGYUAN WOOD
INDUSTRY CO., LTD., FENGXIAN WEIHENG WOOD CO., LTD.,
ZHEJIANG DEHUA TB IMPORT & EXPORT CO., LTD, DEHUA
TB NEW DECORATION MATERIAL CO., LTD., UNITED STEEL
WORKERS, UNIFOR and ASSOCIATION DES SALARIÉS DU
CONTRE-PLAQUÉ DE STE-THÉRÈSE**

Respondents

Heard at Ottawa, Ontario, on December 6, 2022.

Judgment delivered at Ottawa, Ontario, on April 5, 2023.

PUBLIC REASONS FOR JUDGMENT BY:

RIVOALEN J.A.

CONCURRED IN BY:

GAUTHIER J.A.
ROUSSEL J.A.

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. There are no redactions from the confidential reasons for judgment.

RIVOALEN J.A.

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I. Introduction

[1] The applicants apply under paragraph 96.1(1)(a) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (the SIMA) for judicial review of the notice of final determinations of the President of the Canada Border Services Agency (CBSA) issued on January 21, 2021 (Final Determination). On February 5, 2021, the CBSA issued its public statement of reasons for the Final Determination (DONP 2020 IN) (Statement of Reasons), in which it explained that the CBSA terminated the dumping and subsidizing investigations in respect of certain decorative and other non-structural plywood originating in or exported from the People’s Republic of China.

[2] The dumping investigation was terminated against each of the following respondents: Linyi Celtic Wood Co., Ltd.; Celtic Co., Ltd.; Linyi Evergreen Wood Co., Ltd.; Linyi Huasheng Yongbin Wood Co., Ltd.; Pingyi Jinniu Wood Co., Ltd.; Pizhou Jiangshan Wood Co., Ltd.; Shandong Good Wood Imp. and Exp. Co., Ltd.; Xuzhou Shengping Imp and Exp Co., Ltd.; Xuzhou Longyuan Wood Industry Co., Ltd.; and Fengxian Weiheng Wood Co., Ltd. (collectively referred to herein as the Zero-Rated respondents).

[3] The subject goods exported by the Zero-Rated respondents represent only a fraction of the volume of decorative and other non-structural plywood imported into Canada by the Chinese

exporters investigated by the CBSA. During the dumping period of investigation, the Zero-Rated respondents were responsible for 10.9% of the volume of subject goods imported into Canada whereas China as a whole was responsible for 43.33% of the volume of subject goods, expressed as a percentage of total imports (Statement of Reasons at para. 175).

[4] That is, in the dumping and subsidy investigations before the CBSA, the CBSA identified 765 potential Chinese exporters/producers of the subject goods based on CBSA import documentation and information provided by the applicants (Statement of Reasons at para. 25). As noted above, these Chinese exporters/producers represented approximately 44% of the total import of decorative and other non-structural plywood into Canada, the balance being from other countries. Of all these Chinese exporters, only nine replied to the requests for information (RFI) issued by the CBSA (Statement of Reasons at para. 26). Of those who replied, two companies were found to have dumped using the same methodology adopted by the CBSA to determine whether the Zero-Rated respondents were dumping, that being paragraph 19(b) of the SIMA.

[5] The Canadian International Trade Tribunal (CITT) continued the inquiry under section 42 of the SIMA in respect of all the exporters that were found to be dumping and/or subsidizing. Ultimately, the CITT determined that decorative and other non-structural plywood from all these exporters had not injured and was not threatening to injure the domestic industry. This decision is presently the subject of a separate application for judicial review before this Court.

[6] As will be explained further in these reasons, the impugned decision is, strictly speaking, the Final Determination published on January 21, 2021. For the purpose of this judicial review, I

will also refer to the Statement of Reasons, and to the confidential undated internal CBSA memorandum from the Director General, Trade and Anti-dumping Programs Directorate to the Vice-President (the Dumping Memorandum), containing the recommendations for the Final Determination.

[7] The applicants advance two main arguments challenging the Final Determination. The first argument relates to the disclosure and use of the actual calculations of the margins of dumping. In particular, the applicants argue that the CBSA departed from the rule of law because the margins of dumping calculations were not before the President of the CBSA. They also say that the CBSA's failure to provide these calculations in the Statement of Reasons gives rise to a breach of procedural fairness pursuant to paragraph 96.1(2)(b) of the SIMA or to a reviewable error pursuant to paragraph 96.1(2)(d) of the SIMA. Second, the applicants contend that the CBSA's termination of the dumping investigation with respect to the Zero-Rated respondents was unreasonable because it resulted from the CBSA's failure to find that a particular market situation (PMS) existed in respect of the goods of the Zero-Rated respondents or, more broadly, in respect of the goods of the People's Republic of China.

[8] The Attorney General of Canada, one of the respondents, opposes the application for judicial review. He takes the position that the decision to terminate the dumping investigation with respect to the Zero-Rated respondents and not provide the calculations to the applicants was reasonable, and that there was no breach of procedural fairness. It was also not necessary for the President to review the CBSA's actual calculations.

[9] The Zero-Rated respondents echo the Attorney General of Canada's position.

[10] The other respondents, United Steelworkers and Unifor (collectively the Unions), submit that the CBSA unreasonably refused or failed to apply a positive PMS analysis to its methodology of calculating input costs of Chinese producers. The Association des salariés du contre-plaqué de Ste-Thérèse did not make submissions before this Court.

[11] For the reasons that follow, I would dismiss the application for judicial review with costs. The CBSA's alleged failure to include the calculations in the Statement of Reasons did not give rise to a breach of procedural fairness and did not render the Final Determination unreasonable. In addition, the President of the CBSA's decision to terminate the dumping investigation with respect to the goods of the Zero-Rated respondents was reasonable.

II. The SIMA and the SIMA Handbook

[12] Before turning to the Final Determination and the Statement of Reasons, it is helpful to review certain provisions of the SIMA, policies and procedures set out in the SIMA Handbook, as well as certain industry practices relevant to the issues raised in this judicial review. While some of these provisions are not at issue here, they are important to underscore in order to appreciate the complexity encountered by the President of the CBSA when faced with determining the normal value of goods and determining whether a PMS exists.

[13] The relevant provisions of the SIMA and of the *Special Import Measures Regulations*, S.O.R./84-927 (SIMR) are reproduced as Annexes A and B to these reasons.

[14] The President of the CBSA, on his own initiative or upon receipt of a complaint, must initiate an investigation into whether certain goods are being dumped or subsidized into Canada if he is of the opinion that there is evidence that the goods have been dumped or subsidized and that there is a reasonable indication that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury (SIMA, s. 31(1)). In this judicial review, the CBSA's investigation was initiated following a complaint filed by the applicants.

[15] The terms "dumped", "insignificant" and "margin of dumping" are all defined in subsection 2(1) of the SIMA as follows:

- "Dumped" means that the normal value of the goods exceeds the export price of the goods.
- "Insignificant", in relation to a margin of dumping, means a margin of dumping that is less than two per cent (2%) of the export price of the goods.
- "Margin of dumping" means, subject to sections 30.2 and 30.3 of the SIMA, the amount by which the normal value of the goods exceeds the export price of the goods.

[16] Therefore, dumping occurs when the normal value of goods is greater than the export price of the goods. The margin of dumping represents the amount by which the normal value exceeds the export price. It is either zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater (SIMA, s. 30.2(1)). To determine if the dumping is insignificant, the CBSA converts the margin of dumping into a percentage of the export price. Dumping becomes significant when the margin of dumping is 2% or more of the export price of the goods.

[17] Determining the normal value of goods is critical because the normal value is the benchmark against which the price of the exported goods is compared to determine if the exported goods are being dumped.

[18] To obtain the information required to establish the normal value of goods during an investigation, the CBSA issues RFIs to the entity in the foreign country that is producing and/or exporting the goods to Canada. The CBSA can also issue RFIs to the country of export and to importers.

[19] The current practice is for RFI responses to be filed electronically with key sales and costing data set out in Microsoft Excel spreadsheets. As part of the RFI, the exporter is required to complete several key appendices, which include: (1) detailed information on every sale of the goods under investigation that were exported to Canada during a specified period (the period of investigation); (2) details on every sale of the goods under investigation in the exporter's home market during the period of investigation; and (3) details on the production and selling costs of

the goods reported in the first two appendices (Applicants' Public Record, Vol. 2, Tab F, p. 204 at paras. 47–48).

[20] The information obtained from the RFIs is shared with the applicants.

[21] The CBSA can also choose to attend at the offices of the entity in the foreign country that is producing and/or exporting the goods to Canada (SIMA Handbook, s. 4.5.6). As the dumping investigation at issue in this proceeding was conducted during the COVID-19 pandemic, no such attendance occurred. The CBSA relies on the information obtained from responses to the RFIs and the site visits to calculate the margin of dumping (SIMA Handbook, s. 4.4.5.3). The methodology for calculating dumping margins is encompassed within the SIMA and the SIMR.

A. *The calculation of normal values*

(1) Section 15 and subsection 16(1) of the SIMA

[22] The SIMA sets out different methodologies to calculate normal values. The starting point is the methodology for calculating normal values outlined at section 15 of the SIMA, which requires examining the price at which the goods are sold in the country of export. The determination of the normal value of goods under section 15 is subject to the rules set out in section 16 of the SIMA.

[23] In the review before us, the President of the CBSA found that he could not determine the normal values in accordance with section 15 as there were an insufficient number of sales of like goods that complied with all the terms and conditions referred to in section 15 and

subsection 16(1) so as to permit a proper comparison with the sales of the goods to the importer in Canada.

(2) Paragraph 16(2)(c) of the SIMA

[24] When, in the opinion of the President, a PMS exists in respect of any goods of a particular exporter or of a particular country “which does not permit a proper comparison with the sale of the goods to the importer in Canada”, paragraph 16(2)(c) of the SIMA prohibits the CBSA from using domestic sales as the basis for normal values. Depending on the circumstances at play, the CBSA will refer to sections 19 or 29 of the SIMA to calculate normal values: (SIMA, ss. 16(2)(c), 16(2.1); SIMR, ss. 11.2(2)).

[25] The SIMA Handbook explains that the President of the CBSA may form an opinion that a PMS exists if one or more of the following factors have had a significant impact on the domestic sale of like goods in the country of export:

- Government regulations such as price floors, price ceilings, production quotas, import and export controls;
- Taxation policies;
- Government support programs (financial or otherwise);
- The presence and activities of state-owned or state-controlled enterprises in the domestic market as suppliers or purchasers of the like goods (also including other state-owned or state-controlled enterprises such as financial institutions);
- The acquisition of production inputs or processing services that do not reflect market-based costs because they are acquired from suppliers which are state-owned or state-controlled or are affected by government influence or control;

- Significant volatility in economic conditions in the home market of the exporter;
- Evidence of distorted input costs; and
- Any other circumstances which may or may not be the result of government intervention, in which normal market conditions or patterns of supply and demand do not prevail.

(SIMA Handbook, s. 5.2.2.9)

(3) Section 19 of the SIMA

[26] Section 19 offers the President of the CBSA the option of two methodologies, which can be used when the CBSA cannot calculate the margin of dumping for an exporter pursuant to section 15 of the SIMA. Under paragraph 19(a), the price at which the exporter sold like goods to customers in a country other than Canada is used to calculate the normal value. Under paragraph 19(b), the normal value is constructed by aggregating the cost of production of the goods, a reasonable amount for administrative, selling and all other costs, and a reasonable amount for profits. Further details for calculating these amounts are set out in sections 11, 11.2, 12, 13 and 13.1 of the SIMR.

[27] The CBSA calculates the margin of dumping on the basis of the information it receives from the exporters through the RFIs, from the applicants and, if it deems necessary, from its own investigation.

[28] Where a PMS is found to exist, such that the acquisition cost of a particular input does not reasonably reflect the actual cost of that input, subsection 11.2(2) of the SIMR sets out alternative benchmarks for the calculation of cost inputs to be used in the cost production. Under

subsection 11.2(2), the acquisition cost of the input used in the production of goods shall be considered to be one of five possible amounts that reasonably reflects the actual cost of the input so as to permit a proper comparison.

[29] A finding that a PMS exists has broad implications on the dumping investigation. Such a finding may change the methodology with which the cost inputs of the goods are determined, which in turn impacts the calculation of the normal value of the goods, which then impacts the calculation of the margin of dumping. Since a margin of dumping of 2% or more of the export cost is considered not to be insignificant, small changes to the cost inputs can easily increase the margin of dumping above this threshold.

[30] In the review before us, the President of the CBSA found that a PMS did not exist, and determined the normal values of the goods for the Zero-Rated respondents who provided satisfactory data about the costs of production pursuant to paragraph 19(b) of the SIMA.

(4) Section 20 of the SIMA

[31] The third methodology used to calculate normal values is set out at section 20 of the SIMA and is specific to non-market economies. It is not relevant in this proceeding.

(5) Subsection 29(1) of the SIMA

[32] The final methodology used to calculate normal values is applicable where, in the opinion of the President of the CBSA, the information is unavailable or insufficient to allow for a determination under one of the other methodologies. Normal values are then determined by

ministerial specification, pursuant to subsection 29(1) of the SIMA. This methodology aims to limit the advantage an exporter can get by not cooperating with the investigation. It is punitive in nature.

[33] In the review before us, the President of the CBSA determined the normal values of goods pursuant to subsection 29(1) of the SIMA with respect to all goods exported where no information was supplied in respect of the cost of production.

B. *Final determination under section 41 of the SIMA*

[34] Within 90 days of making a preliminary determination on the dumping investigation, the President of the CBSA must make a final determination pursuant to section 41 of the SIMA. In particular, the President of the CBSA must either:

- i. Terminate its dumping investigation against any exporter that is not dumping or whose margin of dumping is “insignificant” (SIMA, s. 41(1)(a)); or
- ii. Make a final determination of dumping against all other exporters and specify the margin of dumping (SIMA, s. 41(1)(b)).

[35] In the present case, the President of the CBSA terminated the dumping investigation with respect to the Zero-Rated respondents pursuant to paragraph 41(1)(a) of the SIMA.

[36] As is evident from this brief review of the statutory framework and policies, the determination of the normal values used to calculate the margin of dumping in order to arrive at a decision under section 41 of the SIMA is not an easy task. It obliges the CBSA to sift through voluminous information and undertake a complex selection and adjustment of information to use as cost inputs in order to complete the required mathematical exercise. All of this must be accomplished within a short timeframe. This determination is sensitive to the inputs; the export price being merely 2% lower than the normal value would constitute dumping.

III. The Final Determination and the Statement of Reasons

[37] The applicants seek judicial review on grounds pertaining to the President of the CBSA's approach to determining whether a PMS existed in the context of its dumping investigations. Therefore, while the President of the CBSA also conducted parallel subsidy investigations, these reasons will focus on the dumping investigations and, in particular, on some of the President of the CBSA's key findings regarding the existence of a PMS.

[38] In the Statement of Reasons, the President of the CBSA stated that, based on the available evidence, he was satisfied that decorative plywood originating in or exported from the Government of China (China) by the Zero-Rated respondents had not been dumped. As a result, on January 21, 2021, the President of the CBSA terminated the dumping investigations pursuant to paragraph 41(1)(a) of the SIMA in respect of those goods.

[39] As mentioned, during the same dumping investigations, when examining the information from exporters other than the Zero-Rated respondents, the President of the CBSA did find significant margins of dumping for two exporters who had provided responses to RFIs: Linyi Jiahe Wood Industry Co., Ltd. (16.03%, expressed as a percentage of the total export price) and the Dehua Group (33.70%, expressed as a percentage of the total export price) (Statement of Reasons at paras. 130, 167). In addition, for all other exporters that did not provide a response to the RFIs or did not offer sufficient and reliable information, the President of the CBSA determined their normal values and export prices pursuant to a ministerial specification under subsection 29(1) of the SIMA, based on a comparative analysis of available data including information submitted by the cooperative exporters (Statement of Reasons at paras. 168–170). The margin of dumping established for the other exporters was 181.81%, expressed as a percentage of the total export price (Statement of Reasons at para. 174).

[40] The Statement of Reasons details all of the information the CBSA requested from exporters and China as part of its dumping investigations for the period of investigation of April 1, 2019 to March 31, 2020. Questions concerning the existence of a PMS were added to the RFIs addressed to exporters, and information related to the decorative plywood market was requested from China. After reviewing the RFI responses, the CBSA sent supplemental RFIs and deficiency letters to several responding parties to clarify information provided and to request additional information, where necessary (Statement of Reasons at paras. 72–76).

[41] As part of the final phase of the investigations, case briefs and reply submissions were provided by counsel representing the applicants and counsel for the exporters and China (Statement of Reasons at para. 78).

[42] The Statement of Reasons includes three appendices. Appendix 1 provides a summary of the CBSA's findings regarding the margin of dumping and amounts of subsidy. The parties' submissions to the CBSA are summarized in Appendix 2. Appendix 3 provides a detailed description of the subsidy programs and incentives from which the responding parties benefited.

[43] With respect to all Zero-Rated respondents, the President of the CBSA found he could not determine normal values in accordance with section 15 of the SIMA as there were not such a number of sales of like goods that complied with sections 15 and subsection 16(1) of the SIMA as to permit a proper comparison with the sales of the goods to the importer in Canada. With respect to Shandong Good Wood Imp. And Exp. Co., Ltd., the CBSA did not have cost of production information for unrelated producers that produced a portion of the subject goods; accordingly, the President of the CBSA could not determine normal values in accordance with section 15 of the SIMA. The President of the CBSA determined the normal values in accordance with paragraph 19(b) of the SIMA with respect to all Zero-Rated respondents, save for the portion of the goods exported (but supplied by third parties) for which the President of the CBSA determined the normal values pursuant to a ministerial specification under subsection 29(1) of the SIMA (Statement of Reasons at paras. 106, 113, 120, 134, 141, 148, 150, 156, 168).

[44] The Statement of Reasons identifies the complaints made by the applicants and their allegation that a PMS existed in the Chinese decorative plywood market due to the combined effect of a multitude of factors. According to the applicants (then the complainants), as a result of the PMS existing in China, the Chinese producers' and exporters' cost of production data did not reasonably reflect the cost of production and therefore should not be used (Statement of Reasons at paras. 92–93).

[45] The Statement of Reasons outlines the specific allegations put forward by the applicants. The applicants alleged that the acquisition costs of inputs were distorted by illegal supply chains, as well as significant state control over domestic timber supplies, and that the manufacturing costs for the production of decorative plywood were distorted because certification standards were routinely circumvented. They also alleged that China heavily regulated the industry, affecting pricing, production, imports and exports, and that China heavily subsidized its decorative plywood industry (Statement of Reasons at para. 97).

[46] The Statement of Reasons explains that, in the course of the dumping investigations, the domestic market of decorative plywood in China was analyzed. Some evidence of the existence of government regulations, state-owned enterprises and subsidization in the market was found, as alleged by the applicants. However, these were not widespread and there was insufficient indication that these factors were contributing to the existence of a PMS (Statement of Reasons at para. 98).

[47] The Statement of Reasons addresses how worldwide illegal logging impacted the decorative plywood industry in China and whether worldwide illegal logging led to distorted input costs in China. Information provided by the applicants included documents showing that China was an importer of illegally sourced timber; both the United States and the European Union have found that products imported from China have contained illegally sourced timber. Hardwood, the primary input in decorative plywood, was more likely to be illegally harvested than softwood, and illegal logging depresses all timber prices, including those harvested legally (Statement of Reasons at para. 99).

[48] The Statement of Reasons describes that published benchmark prices for logs were obtained from four different sources in Canada and the United States. However, the President of the CBSA recognized that Chinese and North American timber markets were different; benchmark prices in one may not have been reasonable surrogates for prices in another. The President of the CBSA reasoned this was because there was a difference in species, seasonality and location of forests between these markets. There was no information on the record detailing how to adjust the data to allow a comparison between Chinese and North American prices. Without such a comparison, and without sufficient qualitative evidence, the President of the CBSA found it was not clear that log prices in China were distorted (Statement of Reasons at para. 100).

[49] In conclusion, based on the information on the administrative record, the President of the CBSA did not form the opinion that a PMS existed in the decorative plywood market in China

that affected the domestic sales such that they did not permit a proper comparison with the sales to the importers in Canada (Statement of Reasons at para. 101).

IV. Issues

[50] I would identify the issues in this judicial review as follows:

1. Does the failure on the part of the President of the CBSA to include the calculations in the Statement of Reasons give rise to a breach of procedural fairness?
2. Does the failure on the part of the CBSA to provide the calculations to the President of the CBSA or to include the calculations in the Statement of Reasons render the Final Determination unreasonable?
3. Does the failure on the part of the President of the CBSA to find that a particular market situation existed in the decorative plywood market in China during the period of investigation render the Final Determination unreasonable?

V. This Court's jurisdiction and the standard of review

[51] This application for judicial review is made under paragraph 96.1(1)(a) of the SIMA. The only powers granted to this Court are those found in subsection 96.1(6) of the SIMA; that is, this Court can dismiss the application, set aside the decision, or set aside the decision and refer the matter back to the President of the CBSA (see also *JFE Steel Corporation v. Evraz Inc. NA Canada*, 2018 FCA 111, 294 A.C.W.S. (3d) 78 at paras. 46, 52–53, leave to appeal to SCC refused, 38276 (7 March 2019) [*JFE Steel*]).

[52] In order to be successful in this application, the applicants must demonstrate that the margin of dumping for the Zero-Rated respondents is not insignificant, that is, that dumping has occurred. There is no basis to set aside a decision of the President of the CBSA if the result would be the same (see *Angang Steel Company Limited v. Canada (Border Services Agency)*, 2020 FCA 67, [2020] 3 F.C.R. 179 at paras. 14, 49 [*Angang Steel*]; *Seah Steel Corporation v. Evraz Inc. NA Canada*, 2017 FCA 172, 283 A.C.W.S. (3d) 542 at para. 34 [*Seah Steel*]).

[53] The *JFE Steel*, *Seah Steel* and *Angang Steel* decisions of this Court pertained to final determinations where the CBSA had concluded that goods had been dumped or the margin of dumping had been significant. Here, the President of the CBSA terminated the dumping investigation because he found that goods were not dumped or the margin of dumping was insignificant. In my view, the same principle applies here. In order for this Court to have jurisdiction in this judicial review, the applicants must demonstrate that the Final Determination would change such that it must be set aside.

[54] The parties agree that the standard of review of the Final Determination is reasonableness. Therefore, the principles enunciated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] apply.

[55] The applicants must demonstrate that the Final Determination regarding the termination of the dumping investigation was unreasonable. In this case, the applicants argue the Final Determination is unreasonable because it is founded on an erroneous determination that a PMS did not exist in China, and therefore the normal values used in the margin of dumping

calculations flow from the wrong methodology. I agree that if the applicants can demonstrate that the President of the CBSA erred in determining that a PMS did not exist in China, this could affect the methodology used in the margins of dumping calculations and significantly change the result of the Final Determination. At the hearing before this Court, the Attorney General of Canada and the Zero-Rated respondents agreed that if the President of the CBSA erred in finding there was no PMS, the applicants would have satisfied their burden.

[56] The applicants also argue that the failure to include the margins of dumping calculations in the Statement of Reasons renders it unreasonable for insufficiency of reasons, or constitutes a breach of procedural fairness.

[57] Regarding the alleged breach of procedural fairness, in the context of a judicial review, no standard of review is applied but the reviewing exercise is “best reflected on a correctness standard” (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, 291 A.C.W.S. (3d) 8 at para. 54 [*CPR I*], cited in *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, 332 A.C.W.S. (3d) 188 at para. 46). “[T]he ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (*CPR I* at para. 56).

VI. Analysis

A. *What is the decision under review?*

[58] Before turning to the analysis of the issues, it is important to clarify what this Court may consider when reviewing the reasoning for the Final Determination which is the decision that is the subject of this application. The applicants argue that the reasons for the decision are only those included in the Statement of Reasons. As such, they say the decision is unreasonable because the Statement of Reasons is “merely a narrative or summary of the CBSA proceedings” (Applicants’ Public Memorandum of Fact and Law at para. 54). They also argue that, absent the calculations of the margins of dumping, such reasons are inadequate as they fail to meet the substantive, procedural, accountability and intelligibility purposes described in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 F.C.R. 425 at paragraph 16. According to the applicants, absent these calculations, the decision is neither transparent nor reviewable, and the underlying reasoning process remains unknown.

[59] In my view, the Final Determination must be read with the Statement of Reasons and the confidential Dumping Memorandum.

[60] The Final Determination indicates that “[a]dditional information about these investigations is contained in a *Statement of Reasons*”, therefore explicitly referencing the Statement of Reasons. In turn, the Statement of Reasons effectively adopts the recommendations contained in the Dumping Memorandum, analogously to the circumstance in *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paragraph 37 (see also *Rosianu v.*

Western Logistics Inc., 2021 FCA 241 at paras. 67–74; *Zulkoskey v. Canada (Employment and Social Development)*, 2016 FCA 268, 273 A.C.W.S. (3d) 323 at para. 16; *Canada (Public Safety and Emergency Preparedness) v. Khalil*, 2014 FCA 213, 245 A.C.W.S. (3d) 397 at para. 29).

[61] The reasoning behind the Final Determination is extensively documented in the Statement of Reasons and the Dumping Memorandum. Moreover, the Statement of Reasons and the Dumping Memorandum are authored by the same person, the Director General, Trade and Anti-dumping Programs Directorate.

[62] In addition, *Vavilov* has instructed us to read the Final Determination in light of the record and with due sensitivity to the CBSA setting (*Vavilov* at paras. 91–98). Here, the record contains a confidential undated internal CBSA memorandum from a Senior Program Officer to a Manager providing an analysis of the PMS in China for final determination of decorative plywood (the PMS Memorandum). Touching on what is at issue before us, the PMS Memorandum outlines each party’s arguments regarding the PMS determination, and explains why the CBSA agrees or disagrees with each argument. In particular, the conclusions in the Statement of Reasons are consistent with the analysis set out in the PMS Memorandum.

B. Does the failure on the part of the President of the CBSA to include the calculations in the Statement of Reasons give rise to a breach of procedural fairness?

[63] The calculations referred to throughout these next sections include all calculation spreadsheets and worksheets created by officers of the CBSA under the SIMA and the SIMR,

such as normal value and export price calculations, margin of dumping calculations and subsidy calculations.

[64] As described in paragraph 19 above, the RFI responses for each exporter and the country of export are generally filed electronically with key sales and costing data set out in Microsoft Excel spreadsheets. There is no doubt that the calculation spreadsheets and worksheets for each exporter and the country under investigation are multifaceted, complicated, cumbersome and voluminous.

[65] In the present application for judicial review, the calculations, preliminary or final, were not part of the record, were not before the decision maker and were not provided to the applicants. However, exporter-specific preliminary calculations were provided to some individual exporters, at their request, after the preliminary determination was made. The SIMA Handbook recognizes the practice of holding disclosure meetings with individual exporters and foreign governments after the preliminary determination is made to review the calculations used to estimate the margins of dumping and amounts of subsidy (SIMA Handbook, s. 4.7.9).

[66] During their oral submissions before us, the applicants' main argument surrounding the calculations was that it was procedurally unfair for them not to have access to these calculations, whereas individual exporters can review calculations specific to their business after the preliminary determination is made.

[67] I do not agree.

[68] It is understood that the applicants are owed a duty of fairness both before the CBSA (as an administrative decision maker) and before this Court.

[69] As mentioned earlier, there is no issue here regarding the fact that, throughout the administrative process, the applicants had access to the information provided by the exporters to the CBSA.

[70] In *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH*, 2006 FCA 398, [2007] 4 F.C.R. 101 [*Uniboard*], this Court considered the duty of procedural fairness in the SIMA context. In certain cases, dumping and subsidy investigations are a “race against the clock” because of the legislative limitation of time allotted for the investigation. As a result of the magnitude of the investigation (in that case, 360,000 pages, six countries, three continents, and five or six different languages), the duty of procedural fairness was set at a low threshold (*Uniboard* at para. 45).

[71] This Court’s emphasis on the impact of strict statutory deadlines (*Uniboard* at para. 45) is not relevant to the present application because the applicants here requested the calculations from the CBSA at the close of the administrative proceeding, after the President of the CBSA had terminated the investigations and the Final Determination was issued. In any event, the duty of procedural fairness owed to the applicants is set at a low threshold, given the access they have to the exporters’ information and the strict statutory timelines imposed on the President of the CBSA to conclude the dumping investigations.

[72] In this case, even if the applicants had obtained access to the calculations after the Final Determination was issued, they would not be allowed to rely on the calculations in support of an application for judicial review. In the context of a judicial review, this Court can only look at the evidence that was before the decision maker (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 19–20). The calculations were not part of the record and were not before the President of the CBSA.

[73] In such circumstances, I see no breach of procedural fairness.

C. *Does the failure on the part of the CBSA to provide the calculations to the President of the CBSA or to include the calculations in the Statement of Reasons render the Final Determination unreasonable?*

[74] At the hearing before us, the applicants conceded that the calculations had been carried out by the CBSA. However, the applicants maintain that the calculations themselves should form part of the record and be before the decision maker. The applicants submit that the SIMA requires the CBSA to carry out the calculations using specified methodologies, and as a result, the decision maker not having access to these calculations is a departure from the rule of law. The applicants also say that, by not including the calculations in the Statement of Reasons, the President of the CBSA failed to provide adequate reasons.

[75] I do not agree.

[76] It is trite to say that administrative decision makers must execute their powers and authority according to their governing statute and in accordance with constitutional principles. A failure to do so can result in a challenge to the court by affected parties. The rule of law also protects against arbitrary decisions and sets limits to discretionary power.

[77] In most administrative tribunals, the calculations or details of an investigation, such as notes of witness interviews, telephone conversations, or calculations are not before the decision maker. What is before the decision maker is usually a report summarizing the factual findings and the methodology used to investigate or determine an issue and reach a conclusion.

[78] This is exactly what was done here. As submitted by the Attorney General of Canada, the decision maker had before it the Dumping Memorandum which summarized the investigation carried out by the CBSA, set out the methodologies used to calculate the margins of dumping and why these were adopted and identified the margins of dumping using those methodologies. As mentioned, in this particular case the same person authored the Dumping Memorandum and the Statement of Reasons. In addition, the PMS Memorandum was part of the evidentiary record.

[79] In such circumstances, it is not unreasonable for the President of the CBSA to rely on the memoranda prepared by officers within the CBSA, without the need to see the detailed calculation spreadsheets and worksheets that led to these memoranda, given the volume of information and the complexity of the calculations generated for each exporter. This is even more reasonable given the statutory constraints and time limits imposed on the President.

[80] Nothing in the SIMA requires the President of the CBSA to have the calculations before him when making the preliminary and final determinations. However, nothing would prevent the President from requesting access to such calculations, should it be deemed necessary. If the calculations were provided to the President, then the calculations would form part of the record and, thus, would become accessible to the applicants, subject to any confidentiality agreements or orders.

[81] In the present application for judicial review, I do not accept that the President of the CBSA's discretion was exercised in an arbitrary way, so as to violate the rule of law, because he did not have the calculations before him. It was reasonable for him to proceed as he did.

[82] I also cannot accept the applicants' argument that, by not providing the detailed calculations as part of the Statement of Reasons, the President of the CBSA failed to provide adequate and intelligible reasons.

[83] Dumping and subsidy investigations conducted by the CBSA entail multiple spreadsheets with extensive data. Their inclusion in the decision would invite a "line-by-line treasure hunt for error" (*Vavilov* at para. 102) and invite a reweighing of the evidence. In a judicial review, the court's role is not to insert itself in the minutiae of the work carried out by investigators but rather to review the reasonableness of the process and the decision itself.

[84] I am satisfied that the Final Determination is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the President of

the CBSA (*Vavilov* at para. 85). It cannot be said that the absence of the calculations in the Statement of Reasons renders the decision inadequate or unintelligible.

D. *Was it reasonable for the President of the CBSA to conclude that a PMS did not exist?*

[85] In 2018, the PMS provisions of the SIMA came into force. The wording found at paragraph 16(2)(c) of the SIMA is based on article 2.2 of the World Trade Organization's Anti-Dumping Agreement, to which Canada is a party.

[86] As discussed previously, while the SIMA and the SIMR do not provide a definition of what is a PMS, the SIMA Handbook provides a list of factors to consider when determining whether a PMS exists. According to the applicants, the factors of "government support programs (financial or otherwise)" and the "evidence of distorted input costs", were not properly assessed by the CBSA when it analyzed whether a PMS existed.

[87] The applicants argue that "[t]he SIMA provides that a PMS may exist with respect to a specific exporter or an entire country. The SIMR provides that a PMS may exist where the acquisition cost of an input used in the production of a Subject Good 'does not reasonably reflect the actual cost of that input.'" In addition, the applicants submit that "the purpose of PMS is to ensure that distorted input prices (such as black market prices) are not used as a basis for calculating normal values" (Applicants' Public Memorandum of Fact and Law at para.65).

[88] The applicants submit various interpretative aids in an attempt to show that the CBSA's interpretation of paragraph 16(2)(c) of the SIMA is unreasonable, including a legislative

summary, an Explanatory Note, the *Interpretation Act*, R.S.C. 1985, c. I-21, and the WTO Anti-Dumping Agreement. The applicants submit that the interpretative aids demonstrate that the PMS was added to the SIMA to “better account for market and price distortions” and “provide Canadian producers with a more rigorous response to unfair trade and better align Canada’s trade remedy system with those of our major trading partners.” The applicants also submit that the objective of the PMS provisions is “remedial” (Applicants’ Public Memorandum of Fact and Law at paras. 64–65).

[89] There is no Canadian jurisprudence on the interpretation or definition of a PMS. The parties identified one WTO Report of the Panel that commented on the issue of a PMS:

Australia – Anti-Dumping Measures on A4 Copy Paper (WT/DS529/R) [WTO-Australia]. Some of the passages from *WTO-Australia* are reproduced below.

[90] In *WTO-Australia*, at paragraph 7.21, the Panel examined the ordinary sense of the terms “particular market situation” and concluded:

We begin by observing that a “situation” is a “state of affairs” or a “set of circumstances”. This term is qualified by the terms “particular” and “market” functioning as adjectives in Article 2.2 of the Anti-Dumping Agreement. The situation in question must arise in, or relate to the “market”, and the market situation must be a “particular” one. It follows from the qualifier “particular” that the market situation must be “distinct, individual, single, specific”. Thus, a fact-specific and case-by-case analysis of the particular market situation is necessarily called for. In addition, we agree with the observation of the GATT panel in *EEC – Cotton Yarn* that a “particular market situation” is only relevant insofar as it has the effect of rendering domestic sales unfit to permit a proper comparison. The phrase “particular market situation” does not lend itself to a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a “proper comparison”. In our view, the drafters’ choice to use such a phrase should be treated as a deliberate one. Consequently, while the

expression “particular market situation” is constrained by the qualifiers “particular” and “market”, it nevertheless cannot be interpreted in a way that comprehensively identifies the circumstances or affairs constituting the situation that an investigating authority may have to consider.

[footnotes omitted, emphasis added]

[91] At paragraph 7.22, the Panel added: “In our view, the market situation must be distinct, individual, single, specific but that does not necessarily make it unusual or out of the ordinary — i.e. exceptional.”

[92] It is apparent from these passages that the determination of whether a PMS exists is highly contextual.

[93] Focusing now on the applicants’ submissions, they advance four main reasons why it was unreasonable for the President of the CBSA to decide that a PMS did not exist in the decorative plywood industry in China: (1) the CBSA limited “government support programs” to “countervailable subsidies”; (2) the CBSA ignored the non-cooperating exporters’ amounts of subsidy when assessing the “government support programs”; (3) the CBSA erroneously found the log prices in China were not distorted; and (4) the CBSA did not examine the cumulative effect of the factors. I will deal with each argument in turn.

(1) Limiting “government support programs” to “countervailable subsidies”

[94] As noted earlier, one of the factors that may contribute to a finding that a PMS exists is the significant impact of “government support programs (financial or otherwise)” on the domestic sales of like goods in the country of export (SIMA Handbook, s. 5.2.2.9).

[95] The applicants submit that the CBSA improperly limited the “government support programs” factor to “countervailable subsidies”. In other words, when considering whether a PMS existed while assessing the government support programs, the CBSA should not have limited its analysis to the countervailable subsidies. In so doing, according to the applicants, the CBSA unreasonably limited the remedial effect of the PMS provisions.

[96] I do not accept the applicants’ arguments. I find it was reasonable for the President of the CBSA, in the context of a determination of whether a PMS might exist, to have limited his analysis of the government support programs to countervailable subsidies. His analysis did not limit the remedial effect of the PMS provisions.

[97] This Court’s role on judicial review is not to compare our own interpretation of legislation with that of the administrative decision maker (*Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, 337 A.C.W.S. (3d) 380 at para. 19, leave to appeal to SCC granted, 39855 (3 March 2022)). This Court must only examine whether the CBSA’s interpretation of paragraph 16(2)(c) of the SIMA is reasonable.

[98] First, it should be noted that the terms “government support programs” come from the SIMA Handbook, a policy document, and not from the legislation. The SIMA and the SIMR do not provide a list of factors to be assessed when determining whether a PMS exists; only the SIMA Handbook provides such a list. However, the SIMA does prescribe which types of subsidies must be assessed in the context of subsidy investigations. It was reasonable for the

CBSA to interpret the terms “government support programs” in a manner that is consistent with the way subsidies are treated under the SIMA.

[99] Next, contrary to the applicants’ assertions, the President of the CBSA did consider all of the information contained in the record on government support programs. A review of Appendix 3 to the Statement of Reasons provides detailed information of all such government support programs provided to the CBSA during their subsidy investigation.

[100] It was reasonable for the President of the CBSA to conclude that, while plywood producers in China received subsidies, there was no evidence they had a significant impact on the domestic sales of decorative plywood in China (Statement of Reasons at para. 98; Applicants’ Confidential Record, Vol. 2, Tab 33, PMS Memorandum at p. 500).

[101] Further, the consideration of government support programs in this case involved countervailable subsidies because these were the ones targeted by the applicants in their complaint (Applicants’ Confidential Record, Vol. 1, Tab F-5, Confidential Complaint at pp. 94, 96; Applicants’ Public Record, Vol. 7, Tab F-25 at pp. 3334–35; Applicants’ Confidential Record, Vol. 3, Tab I-3, Confidential Case Brief at pp. 665–86). However, the President of the CBSA did not limit his consideration to only the programs identified by the applicants or programs specifically targeting decorative plywood. He considered a broad range of subsidy programs.

[102] In addition to the information provided by the applicants and the research it conducted, the CBSA sought information from exporters and from China on government support programs via the RFIs. It relied on its parallel subsidy investigation in which it found that the majority of exporters did not have a significant amount of subsidy. In the parallel subsidy investigation, the CBSA considered only countervailable subsidies, which are a subset of all possible subsidies and government support programs, as it was required to do pursuant to subsection 30.4(3) of the SIMA.

[103] Subsection 30.4(3) of the SIMA prohibits the CBSA from considering non-actionable subsidies when assessing the amount of subsidy. It reads as follows:

Exception

30.4(3) An amount of subsidy shall not include any amount that is attributable to a non-actionable subsidy.

Exception

30.4(3) Un montant de subvention ne peut comprendre un montant attribuable à une subvention ne donnant pas lieu à une action.

[104] Although subsection 30.4(3) of the SIMA is not directly applicable to the PMS determination (the PMS determination does not entail determining an amount of subsidy, but whether a “particular market situation exists which does not permit a proper comparison with the sale of goods to the importer in Canada”), it was reasonable for the President of the CBSA to follow the same methodology and restrictions when assessing government support programs.

[105] In so doing, even though the vast majority of Chinese plywood producers were assigned an amount of subsidy by ministerial specification, it was reasonable for the President of the

CBSA to conclude that the sole existence of those subsidies was insufficient for him to form the opinion that a PMS existed.

[106] In conclusion, the CBSA's consideration of the government support programs was reasonable. It was not unreasonable for the President of the CBSA, when considering government support programs in the context of whether a PMS existed, to only consider those he had already assessed under the subsidy investigation. Contrary to what the applicants submit, this does not reduce the concept of PMS to something that was already provided for in the SIMA prior to the addition of the PMS provisions.

(2) Ignoring the non-cooperating exporters' amounts of subsidy

[107] Turning to their second argument, the applicants submit that the CBSA improperly ignored the non-cooperating exporters' amounts of subsidy when it assessed whether a PMS existed in China.

[108] The amounts of subsidy for the non-cooperating exporters were based on a ministerial specification pursuant to subsection 30.4(2) of the SIMA because those exporters either did not provide a response to the CBSA's subsidy RFI or did not furnish sufficient information. These are artificial amounts that are designed to limit the advantage an exporter may gain by not providing the requested information and do not reflect the actual amounts of subsidies received.

[109] In such circumstances, when the amounts of subsidy do not reflect the amounts of subsidy actually received, it was reasonable for the CBSA not to take into consideration the

amounts of subsidy specified for the non-cooperating exporters when assessing whether a PMS existed in China.

(3) Log prices in China

[110] The third argument advanced by the applicants is that the CBSA erred when it concluded the price of logs in China was not distorted.

[111] The applicants note that the CBSA acknowledged the presence of illegally sourced timber in China, but “[t]he Applicants submit that the CBSA’s conclusion that illegal logging in China did not have a price distortive effect, and therefore did not contribute to a PMS, is unfounded and ignores the evidence presented by the Applicants” (Applicants’ Public Memorandum of Fact and Law at para. 88). The applicants go further and argue that if the CBSA was not satisfied with the evidence, it should have taken the “minor” investigative step and asked for more information from the applicants in order to make adjustments to the applicants’ data.

[112] Building on this argument, the applicants submit that “[t]he CBSA did not request any information on how to adjust the data to take into account differences between Chinese and non-Chinese published input prices” and “[i]t is unreasonable for the CBSA to refrain from requesting that responding exporters provide information on adjustments when it sought no such information from the Applicants, but still reject the Log Benchmarks, in part, because of a lack of information on adjustments” (Applicants’ Public Memorandum of Fact and Law at para. 112).

[113] Although the applicants raise various points in their submissions in this regard, the essence of their submissions may be summarized into two questions:

- 1) Was it reasonable for the President of the CBSA to find that there was insufficient qualitative evidence to conclude that the price of logs in China was distorted based on the evidence that was before the CBSA? and

- 2) Was it reasonable for the President of the CBSA not to request additional information from the applicants, from exporters or from third countries when assessing whether the price of logs in China was distorted?

[114] On the first question, the applicants are asking this Court to reweigh the evidence that was before the President of the CBSA and to arrive at a different conclusion from his. That is not our role on judicial review. When the President of the CBSA formed his opinion that a PMS did not exist, he assessed and evaluated all the available evidence on the record. This Court must refrain from reweighing and reassessing this evidence. Further, the President of the CBSA has a special expertise and, in light of this, we must show deference. Absent exceptional circumstances, this Court should not interfere with the decision maker's factual findings (*Vavilov* at para. 125). There are no such exceptional circumstances here.

[115] On the second question regarding whether the President of the CBSA was required to seek further information when assessing whether a PMS existed, the statutory framework of the SIMA and the SIMR leaves room for flexibility in such investigations. The SIMA does not

require the President to request any specific information and the SIMR limits the complainant's obligations to providing a complaint with "such details as are reasonably available". In *Seah Steel*, this Court explained that, due to the strict statutory deadlines, "the President must be given considerable discretion to determine how best to obtain the necessary information within these relatively short time limits" (*Seah Steel* at para. 7). This applies here.

[116] Subsection 41(1) of the SIMA provides that the final determination of the President of the CBSA shall be made "on the available evidence". It does not require the President to have "all" the information or "the best" information. This makes sense, because the President must render his final determination within very strict timelines, that is, 90 days from the issuance of the preliminary determination on dumping.

[117] Further, the SIMA does not require the President of the CBSA to request additional information from the applicants. The provisions outlining the President's powers to require that evidence be provided (subsection 78(1) of the SIMA) or to gather information (section 96 of the SIMA) are permissive, not prescriptive.

[118] Turning to the SIMA Handbook, as previously mentioned, it is a policy document and does not bind the President of the CBSA, although there is no doubt that it is a useful guide for the CBSA and all parties involved when faced with such complex investigations. Nothing in the SIMA Handbook imposes specific positive obligations on the President to gather information and verify submissions. The SIMA Handbook requires officers to endeavour to gather the missing data and verify submissions, that is all (SIMA Handbook, ss. 4.5.4, 4.5.6, 4.5.7, 4.5.8).

[119] According to the SIMA Handbook, if a complaint is received in which the complainant alleges a PMS exists, it is for the complainant to outline the facts on which this allegation is made and provide such information that is available to support these facts. The information must be relevant and reliable in order to be considered “properly documented” for the purposes of section 32 of the SIMA. If the CBSA becomes aware that a PMS may exist, for example, as a result of responses to the initial RFIs, the officer may request further information and send out supplemental RFIs (SIMA Handbook, s. 5.2.2.9).

[120] That is not to say that the President of the CBSA could not have requested further information. It is, of course, within his discretion to do so. The applicants provide two cases where the CBSA conducted its own research for benchmarks: *Certain Corrosion-Resistant Steel Sheet from China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), India and South Korea*, Statement of Reasons for Final Determination (February 6, 2019), COR 2018 IN at paragraphs 124–26 and *Cold-Rolled Steel Sheet from China, South Korea and Vietnam*, Statement of Reasons for Final Determination (November 15, 2018), CRS 2018 IN at paragraph 130 (Applicants’ Public Memorandum of Fact and Law at para. 105).

[121] These cases pertained to the determination of normal values, not the existence of a PMS. There is an inherent difference between the CBSA seeking information for determining the normal value of the goods, which the CBSA must do to perform its duties under the SIMA (or rely on subsection 29(1) for a ministerial specification) and the discretionary determination of whether a PMS exists. In addition, these CBSA decisions do not create a positive obligation on

the President of the CBSA to seek further information. Just because the President sought information in the particular context of previous investigations does not mean he is required to do so for all investigations.

[122] As a result of the statutory framework and the considerable discretion the President of the CBSA enjoys, I conclude that it was reasonable for him to consider the evidence available on the record and not request further information from the applicants, the exporters or third countries. I cannot accept the applicants' assertions that the President should have required further information to adjust and verify the complainant's information.

[123] The same reasoning applies to the applicants' assertion that the CBSA should have, of its own initiative, performed an analysis comparing the material cost per model produced in the United States and produced in China with the product distinctions that were missing from the analysis submitted by the applicants. The applicants characterize this as a "minor additional investigative step" (Applicants' Confidential Memorandum of Fact and Law at para. 107). However, it is unclear whether the CBSA had all the information it needed to perform this additional step.

[124] In my view, based on the CBSA's assessment of the evidence that was available on the record, it was reasonable for the President of the CBSA to refrain from concluding that the price of logs in China was actually distorted. As stated previously, it is not for this Court to reweigh the CBSA's assessment of the evidence. The PMS Memorandum explains that the CBSA rejected the applicants' evidence on the comparison between the Chinese costs and a

complainant's costs for several reasons. It lacked an adjustment for the difference between the United States and Chinese markets. It was based on unverified information, and one analysis did not take into consideration important product distinctions like thickness (PMS Memorandum at p. 513).

[125] The applicants also note that there is an incoherence between the Statement of Reasons and the PMS Memorandum. In the Statement of Reasons, the President of the CBSA indicates that the Chinese and North American timber markets have “differences in species [...] of forests” (Statement of Reasons at para. 100). In the PMS Memorandum, the CBSA states that the United States and China have similar species of trees (PMS Memorandum at p. 513).

[126] These findings may seem incompatible, but this incompatibility is without consequence. In the PMS Memorandum, the CBSA uses the similarity of species of trees to reject the exporters' argument that comparison between the United States and China is inappropriate because of their differences. The CBSA then concludes that the comparison between the United States and China is inappropriate for other reasons. In the Statement of Reasons, the President of the CBSA rejects the comparison of log prices between the North American and Chinese markets because of a lack of information on how to adjust for the differences between these locations, including the differences in tree species.

[127] These two conclusions (rejecting the comparison between the United States/North America and China) are consistent, even if one element of their justification is not. To conclude

the Final Determination is unreasonable for this reason would be tantamount to embarking on a “line-by-line treasure hunt for error” (*Vavilov* at para. 102).

(4) Cumulative effect of factors

[128] Turning now to their final submissions on the existence of a PMS, the applicants assert that the President of the CBSA did not analyze the cumulative effect of the factors when assessing whether a PMS existed.

[129] In particular, the applicants argue that the CBSA’s approach was to review the factors that may give rise to a PMS separately, “rather than considering the cumulative impact of market distortions.” The appellants submit “the CBSA ought to have considered whether the evidence relating to various factors could have cumulatively and incrementally given rise to a PMS” (Applicants’ Public Memorandum of Fact and Law at paras. 115–16).

[130] In the complaint, the applicants alleged that a PMS existed in China for four reasons: (1) input costs were distorted because of illegally harvested logs, as well as significant state control over domestic timber supplies; (2) manufacturing costs for the production of decorative plywood were distorted because certification standards were routinely circumvented; (3) China heavily regulated the industry, which affected pricing, production, imports and exports; and (4) China heavily subsidized its decorative plywood industry.

[131] In the PMS Memorandum, the CBSA looked at five factors: (1) the government regulations such as price floors, price ceilings, productions quotas, import and export controls;

(2) government support programs (financial or otherwise); (3) the acquisition of production inputs or processing services that do not reflect market-based costs because they are acquired from suppliers which are state-owned or state-controlled or that are affected by government influence or control; (4) evidence of distorted input costs; and (5) any other circumstances which may or may not be the result of government intervention, in which normal market conditions or patterns of supply and demand do not prevail (PMS Memorandum at p. 492).

[132] The CBSA found that none of the five factors it considered supported the existence of a PMS in China. The CBSA was clearly aware that the applicants alleged that the cumulative or combined impacts of the factors led to the existence of a PMS (Statement of Reasons at para. 92; PMS Memorandum at p. 486). The President of the CBSA simply did not accept the applicants' arguments. Before us, the applicants have not explained how and why, on this evidentiary record, a combination of the factors supported the existence of a PMS. The applicants have failed to demonstrate a reviewable error.

(5) Determination

[133] In sum, this Court has described the nature of dumping and subsidy investigations as a process that is “complex and technical and requires specialized analysis and calculations of commercial data” and is “essentially a fact-finding economic mission in an international trade context” (*Uniboard* at para. 28). Similarly, as is evident from the passages cited at paragraphs 90 and 91 above from *WTO-Australia*, the consideration of a potential PMS is a highly contextual assessment. This factually intensive assessment is conducted under a complex technical framework and under strict statutory timelines.

[134] The President of the CBSA assessed each factor, considered all of the available evidence and explained why he did not form an opinion that a PMS existed in China. His conclusion was the result of a highly discretionary and fact-based assessment that falls within his expertise. In conducting a reasonableness review, I am cognizant that this Court must be attentive to the application by the President of his specialized knowledge and expertise (*Vavilov* at para. 93).

[135] None of the arguments put forward by the applicants have convinced me that it was unreasonable for the President of the CBSA to form the opinion that a PMS did not exist in respect of the goods of the Zero-Rated respondents or, more broadly, in respect of the goods of China. I see no reason to interfere with the Final Determination.

VII. Conclusion

[136] For these reasons, I would dismiss the application for judicial review with costs. In accordance with the agreement reached between the parties, a total amount of \$4,500 in costs shall be paid by the applicants and the Unions to the Attorney General of Canada and the Zero-Rated respondents.

[137] I would like to thank all counsel for the assistance they provided to the Court, their excellent written materials and their helpful oral submissions.

"Marianne Rivoalen"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Sylvie E. Roussel J.A."

VIII. ANNEX A – Special Import Measures Act, R.S.C. 1985, c. S-15 (SIMA)

Definitions

2 (1) In this Act,

...

dumped, in relation to any goods, means that the normal value of the goods exceeds the export price thereof; (sous-évalué)

...

insignificant means, (a) in relation to a margin of dumping, a margin of dumping that is less than two per cent of the export price of the goods, and (b) in relation to an amount of subsidy, an amount of subsidy that is less than one per cent of the export price of the goods; (minimale)

...

margin of dumping, in relation to any goods, means, subject to sections 30.2 and 30.3, the amount by which the normal value of the goods exceeds the export price of the goods; (marge de dumping)

...

Determination of normal value of goods

15 Subject to sections 19 and 20, where goods are sold to an importer in Canada, the normal value of the goods is the price of like goods when they are sold by the exporter of the first mentioned goods

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

sous-évalué Qualificatif de marchandises dont la valeur normale est supérieure à leur prix à l'exportation. (dumped)

[...]

minimale S'entend : a) dans le cas de la marge de dumping, d'une marge inférieure à deux pour cent du prix à l'exportation des marchandises; b) dans le cas du montant de subvention, d'un montant inférieur à un pour cent du prix à l'exportation des marchandises. (insignificant)

[...]

marge de dumping Sous réserve des articles 30.2 et 30.3, l'excédent de la valeur normale de marchandises sur leur prix à l'exportation. (margin of dumping)

[...]

Valeur normale des marchandises

15 La valeur normale des marchandises vendues à un importateur se trouvant au Canada est, sous réserve des articles 19 et 20, le prix, rectifié conformément au présent article, auquel des

marchandises similaires sont vendues, par l'exportateur des marchandises mentionnées en premier lieu :

(a) to purchasers

(i) with whom the exporter is not associated at the time of the sale of the like goods, and

(ii) who are at the same or substantially the same trade level as the importer,

(b) in the same or substantially the same quantities as the sale of goods to the importer,

(c) in the ordinary course of trade for use in the country of export under competitive conditions,

(d) during such period of sixty days that ends in the interval commencing with the first day of the year preceding the date of the sale of the goods to the importer and ending on the fifty-ninth day after such date as is selected by the President or, where, in the opinion of the President, the nature of the trade in those goods or the fact that they are sold to the importer for future delivery requires that sales of like goods by the exporter during a period other than a period of sixty days that ends in that interval be taken into account, during such period of sixty days or longer

a) à des acheteurs :

(i) auxquels il n'est pas associé au moment de la vente des marchandises similaires,

(ii) qui se situent au même niveau ou presque du circuit de distribution que l'importateur;

b) en quantités égales ou sensiblement égales aux quantités vendues à l'importateur;

c) dans le cours ordinaire des affaires pour consommation dans le pays d'exportation en situation de concurrence;

d) pendant la période de soixante jours que précise le président et qui se termine au cours de l'intervalle commençant le premier jour de l'année précédant la date de la vente à l'importateur et se terminant le cinquante-neuvième jour qui suit cette date ou, si le président est d'avis que, vu la nature du commerce de ces marchandises ou le fait que celles-ci sont livrables à terme, il est nécessaire de tenir compte des ventes de marchandises similaires effectuées par l'exportateur pendant une autre période, alors pendant la période d'au moins soixante jours que le président rend applicable à ces marchandises ou à des marchandises de la même catégorie et qui :

(i) that precedes the date of the sale of the goods to the importer, or

(ii) where the goods are sold to the importer for future delivery, that precedes the date of the sale of the goods to the importer or within the year that precedes the date of the delivery of the goods to the importer

(e) at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade,

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

...

Rules applied in determining normal value

16 (1) In the application of section 15 in the case of any goods,

(a) if there was not, in the opinion of the President, such a number of sales of like goods made by the exporter at the place described in paragraph 15(e) as to permit a proper comparison with the sale of

(i) ou bien précède la date de la vente à l'importateur,

(ii) ou bien, dans le cas de marchandises livrables à terme, soit précède la date de la vente, soit se situe dans l'année précédant la date de livraison;

e) au lieu d'où les marchandises ont été directement expédiées au Canada ou, à défaut d'expédition au Canada, au lieu d'où, dans des conditions commerciales normales, les marchandises seraient expédiées directement au Canada.

La rectification nécessaire à l'application du présent article, réalisée selon les modalités et dans les circonstances prévues par règlement, a pour objet de traduire, en ce qui a trait à la comparaison entre le prix des marchandises vendues à l'importateur et le prix des marchandises similaires vendues par l'exportateur, les différences existant notamment en matière de conditions de vente et de taxation.

[...]

Règles applicables à sa détermination

16 (1) Pour l'application de l'article 15 :

a) si, selon le président, l'exportateur n'a pas effectué, au lieu désigné à l'alinéa 15e), un nombre de ventes de marchandises similaires permettant une comparaison utile avec les ventes

the goods to the importer in Canada, but sales of like goods were made by the exporter at one other place or several other places in the country of export, there shall, for the purpose of making that comparison, be included with sales of like goods made by the exporter at the place described in paragraph 15(e) sales of like goods made by the exporter at that one other place or at the nearest of the several other places to the place described in paragraph 15(e), as the case may be;

(b) if there was not, in the opinion of the President, such a number of sales of like goods made by the exporter to purchasers described in subparagraph 15(a)(i) who are at the same or substantially the same trade level as the importer in Canada as to permit a proper comparison with the sale of goods to the importer, but there was such a number of sales of like goods made to purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer, there shall be substituted for the purchasers described in paragraph 15(a) purchasers described in subparagraph 15(a)(i) who are at the trade level nearest and subsequent to that of the importer;

(c) if by reason of the fact that (i) the sales of like goods made by the exporter were solely or primarily for export, or (ii) the sales of like goods made by the exporter during the period that is applicable by reason of paragraph 15(d) were solely or primarily to purchasers who at any time during that period

des marchandises à l'importateur se trouvant au Canada mais qu'il a effectué des ventes de marchandises dans un ou plusieurs autres lieux du pays d'exportation, les ventes de marchandises similaires en cet autre lieu ou celui des plusieurs autres lieux qui est le plus proche de celui désigné à l'alinéa 15e), selon le cas, sont ajoutées aux ventes de marchandises similaires que l'exportateur a effectuées au lieu désigné à l'alinéa 15e);

b) les acheteurs visés au sous-alinéa 15a)(i) et qui sont situés au niveau suivant du circuit de distribution le plus proche de celui de l'importateur doivent être préférés, pour permettre une comparaison utile avec la vente de marchandises à l'importateur, aux acheteurs visés à l'alinéa 15a) si le président est d'avis que le nombre de ventes de marchandises similaires par l'exportateur aux acheteurs visés au sous-alinéa 15a)(i) et qui sont situés au même niveau ou presque du circuit de distribution que l'importateur se trouvant au Canada ne permet pas une comparaison utile;

c) sont réputés être l'exportateur le ou les vendeurs que le président peut désigner parmi ceux qui ont effectué des ventes de marchandises similaires pour consommation intérieure dans le pays d'exportation si le président est d'avis que l'exportateur n'a pas effectué un nombre de ventes de

were not purchasers described in subparagraph 15(a)(i), there was not, in the opinion of the President, such a number of sales of like goods made by the exporter as to permit a proper comparison with the sale of the goods to the importer in Canada, but there were sales of like goods for use in the country of export by other vendors, such one or more of any of those vendors that the President may specify shall be deemed to be the exporter for the purpose of determining the normal value of the goods sold to the importer in Canada;

(d) if the quantity of goods sold to the importer in Canada is larger than the largest quantity of like goods sold by the exporter for use in the country of export, the sales of like goods shall be those sales of like goods that are in the largest quantity sold by the exporter for such use; and

(e) if the quantity of goods sold to the importer in Canada is smaller than the smallest quantity of like goods sold by the exporter for use in the country of export, the sales of like goods shall be those sales of like goods that are in the smallest quantity sold by the exporter for such use.

Idem

marchandises similaires permettant une comparaison utile avec les ventes des marchandises à l'importateur se trouvant au Canada parce qu'elles ont été faites, selon le cas : (i) uniquement ou essentiellement pour l'exportation, (ii) uniquement ou essentiellement à des acheteurs qui n'étaient pas des acheteurs visés au sous-alinéa 15a)(i) au cours de la période applicable en vertu de l'alinéa 15d);

d) les ventes de marchandises similaires sont celles où les marchandises similaires sont en quantité la plus grande et que l'exportateur a effectuées pour consommation dans le pays d'exportation si la quantité de marchandises vendue à l'importateur se trouvant au Canada est plus grande que la plus grande quantité de marchandises similaires que l'exportateur ait vendue pour consommation dans ce pays;

e) les ventes de marchandises similaires sont celles où les marchandises similaires sont en quantité la moins grande et que l'exportateur a effectuées pour consommation dans le pays d'exportation si la quantité de marchandises que l'exportateur a vendue à l'importateur se trouvant au Canada est plus petite que la plus petite quantité de marchandises similaires qu'il ait vendue pour consommation dans ce pays.

Idem

16 (2) In determining the normal value of any goods under section 15, there shall not be taken into account

(a) any sale of like goods for use in the country of export by a vendor to a purchaser if the vendor did not, at the same or substantially the same time, sell like goods in the ordinary course of trade to other persons in the country of export at the same trade level as, and not associated with, the purchaser;

(b) any sale of like goods by the exporter within a period, determined by the President, of not less than six months, where

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

(ii) either

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

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

16 (2) Dans le calcul de la valeur normale de marchandises visée à l'article 15, il n'est pas tenu compte des ventes de marchandises similaires qui suivent :

a) celles effectuées pour consommation dans le pays d'exportation par un vendeur qui, au même moment ou à peu près, ne vendait pas, dans le cours ordinaire des affaires et dans le pays d'exportation, des marchandises similaires à des personnes, autres que l'acheteur, non associées à celui-ci et situées au même niveau du circuit de distribution que lui;

b) la vente de marchandises similaires effectuée par l'exportateur au cours d'une période, choisie par le président, d'au moins six mois lorsque, à la fois :

(i) la vente est effectuée à un prix inférieur au coût des marchandises,

(ii) ou bien :

(A) la vente — seule ou combinée avec d'autres ventes visées au sous-alinéa (i) — constitue un volume d'au moins vingt pour cent du volume total des marchandises similaires vendues au cours de cette période,

(B) le prix de vente moyen de marchandises similaires vendues par l'exportateur au cours de cette période est inférieur au coût moyen de ces marchandises,

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

(iii) la vente est effectuée à un prix unitaire non supérieur au coût moyen de toutes les marchandises similaires vendues au cours de cette période;

(c) any sale of like goods for use in the country of export by the exporter to a purchaser if, in the opinion of the President, a particular market situation exists which does not permit a proper comparison with the sale of the goods to the importer in Canada.

c) la vente de marchandises similaires effectuée par l'exportateur à un acheteur pour consommation dans le pays d'exportation si le président est d'avis qu'il existe une situation particulière du marché qui ne permet pas une comparaison utile avec la vente des marchandises à l'importateur au Canada.

...

[...]

16 (2.1) For the purposes of paragraph (2)(c), a particular market situation may be found to exist in respect of any goods of a particular exporter or of a particular country, as is appropriate in the circumstances

16 (2.1) Pour l'application de l'alinéa (2)c), l'existence d'une situation particulière du marché peut être établie à l'égard de toute marchandise d'un exportateur ou d'un pays donné, tel qu'il serait approprié dans les circonstances.

...

[...]

Where normal value cannot be determined under section 15

Autre moyen de calculer la valeur normale

19 Subject to section 20, where the normal value of any goods cannot be determined under section 15 by reason that there was not, in the opinion of the President, such a number of sales of like goods that comply with all the terms and conditions referred to in that section or that are applicable by virtue of subsection 16(1) as to permit a proper comparison with the sale of the goods to the importer, the normal value of the goods shall be determined, at the

19 La valeur normale de marchandises visée à l'article 15 qui ne peut être établie parce que le nombre de ventes de marchandises similaires remplissant les conditions énumérées à l'article 15 ou applicables en vertu du paragraphe 16(1) ne permet pas, de l'avis du président, une comparaison utile avec la vente des marchandises à l'importateur se trouvant au Canada, est, au choix du président, dans chaque cas ou série de cas, l'un des

option of the President in any case or class of cases, as

(a) such price of like goods when sold by the exporter to importers in any country other than Canada during the period referred to in paragraph 15(d) as, in the opinion of the President, fairly reflects the market value of the goods at the time of the sale of the goods to the importer in Canada, adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer in Canada and the like goods sold by the exporter to importers in the country other than Canada; or

(b) the aggregate of

(i) the cost of production of the goods,

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

(iii) a reasonable amount for profits.

...

Normal value where export monopoly

montants suivants, sous réserve de l'article 20 :

a) le prix de vente, d'une part, auquel des marchandises similaires sont vendues, au cours de la période visée à l'alinéa 15d), par l'exportateur à des importateurs se trouvant dans des pays étrangers et, d'autre part, qui, de l'avis du président, traduit la valeur marchande de ces marchandises au moment de leur vente à l'importateur se trouvant au Canada, ce prix étant rectifié, selon les modalités et dans les circonstances prévues par règlement, dans le but de traduire, en ce qui a trait à la comparaison entre le prix des marchandises vendues à l'importateur se trouvant au Canada et le prix des marchandises similaires vendues par l'exportateur à des importateurs se trouvant dans ces pays étrangers, les différences existant notamment en matière de conditions de vente et de taxation;

b) la somme des montants suivants :

(i) le coût de production des marchandises,

(ii) un montant raisonnable pour les frais, notamment les frais administratifs et les frais de vente,

(iii) un montant raisonnable pour les bénéfices.

[...]

Valeur normale en cas de monopole à l'exportation

20 (1) Where goods sold to an importer in Canada are shipped directly to Canada

(a) from a prescribed country where, in the opinion of the President, domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market, or

(b) from any other country where, in the opinion of the President,

(i) the government of that country has a monopoly or substantial monopoly of its export trade, and

(ii) domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market, the normal value of the goods is

(c) where like goods are sold by producers in any country other than Canada designated by the President for use in that country,

(i) the price of the like goods at the time of the sale of the goods to the importer in Canada, adjusted in the prescribed manner and circumstances to reflect the

20 (1) Si des marchandises vendues à un importateur se trouvant au Canada sont expédiées directement au Canada :

a) soit d'un pays désigné par règlement dont, de l'avis du président, le gouvernement fixe, en majeure partie, les prix intérieurs de sorte qu'il y a lieu de croire que ceux-ci seraient différents dans un marché où joue la concurrence;

b) soit d'un pays autre qu'un pays désigné par règlement dont, de l'avis du président, le gouvernement, à la fois :

(i) exerce un monopole ou un quasi-monopole sur son commerce à l'exportation,

(ii) fixe, en majeure partie, les prix intérieurs de sorte qu'il y a lieu de croire que ceux-ci seraient différents dans un marché où joue la concurrence, l'un des montants suivants représente la valeur normale de ces marchandises :

c) au choix du président dans chaque cas ou série de cas, si des marchandises similaires sont vendues par des producteurs pour consommation dans un pays étranger désigné par le président :

(i) soit le prix de ces marchandises similaires au moment de la vente des marchandises à l'importateur se trouvant au Canada, rectifié selon les modalités et dans les

differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer in Canada and the like goods sold by producers in the country other than Canada designated by the President for use in that country, or

circonstances prévues par règlement, dans le but de traduire, en ce qui a trait à la comparaison entre le prix des marchandises vendues à l'importateur se trouvant au Canada et le prix des marchandises similaires vendues par des producteurs pour la consommation dans le pays étranger désigné par le président, les différences existant notamment en matière de conditions de vente et de taxation,

(ii) the aggregate of

(ii) soit la somme des montants suivants :

(A) the cost of production of the like goods,

(A) le coût de production de ces marchandises,

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

(B) un montant raisonnable pour les frais, notamment les frais administratifs et les frais de vente,

(C) a reasonable amount for profits, whichever of the price or aggregate the President designates for any case or class of cases; or

(C) un montant raisonnable pour les bénéfices;

d) where, in the opinion of the President, sufficient information has not been furnished or is not available to enable the normal value of the goods to be determined as provided in paragraph (c), the price of like goods

d) si le président est d'avis qu'il est impossible d'établir la valeur normale des marchandises en vertu de l'alinéa c) vu l'insuffisance ou l'inaccessibilité des renseignements nécessaires, le prix, rectifié conformément au présent alinéa, de marchandises similaires :

(i) produced in any country designated by the President, other than Canada or the country from which the goods were shipped directly to Canada, and

(i) produites dans le pays étranger — autre que celui d'où les marchandises ont été directement expédiées au Canada — que désigne le président,

(ii) imported into Canada and sold by the importer thereof in the condition in which they were imported to a person with whom, at the time of the sale, the importer was not associated, such price to be adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the imported like goods in relation to their sale by the importer thereof.

(ii) en outre, importées au Canada et vendues, dans le même état que lors de leur importation, par leur importateur à une personne à laquelle il n'était pas associé au moment de la vente. La rectification nécessaire à l'application du présent alinéa, réalisée selon les modalités et dans les circonstances prévues par règlement, a pour objet de traduire, en ce qui a trait à la comparaison entre le prix des marchandises vendues à l'importateur et celui des marchandises similaires importées quant à leur vente par leur importateur, les différences existant notamment en matière de conditions de vente et de taxation.

Limitation

20 (2) The President may not designate a country under paragraph (1)(d) if

(a) the like goods of that country are also the subject of investigation under this Act, unless the President is of the opinion that those goods are not dumped goods; or

(b) in the opinion of the President, the price of the like goods imported into Canada has been significantly influenced by a country described in paragraphs (1)(a) and (b).

...

Normal value and export price where information not available

29 (1) Where, in the opinion of the President, sufficient information has

Non-désignation d'un pays

20 (2) Le président ne désigne pas un pays aux termes de l'alinéa (1)d) si, selon le cas :

a) les marchandises similaires de ce pays font également l'objet d'une enquête sous le régime de la présente loi, à moins qu'à son avis ces marchandises ne soient pas sous-évaluées;

b) à son avis, le prix des marchandises similaires importées au Canada a été considérablement influencé par un pays visé par les alinéas (1)a) et b).

[...]

Renseignements insuffisants

29 (1) La valeur normale et le prix à l'exportation sont établis selon les

not been furnished or is not available to enable the determination of normal value or export price as provided in sections 15 to 28, the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies.

...

Margin of dumping re goods of an exporter

30.2 (1) Subject to subsection (2), the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.

...

Where no prescribed manner

30.4 (2) Where no manner of determining an amount of subsidy has been prescribed or, in the opinion of the President, sufficient information has not been provided or is not otherwise available to enable the determination of the amount of subsidy in the prescribed manner, the amount of subsidy shall, subject to subsection (3), be determined in such manner as the Minister may specify.

Exception

30.4 (3) An amount of subsidy shall not include any amount that is attributable to a non-actionable subsidy.

modalités que fixe le ministre dans les cas où le président est d'avis qu'il est impossible de les établir conformément aux articles 15 à 28 vu l'insuffisance ou l'inaccessibilité des renseignements nécessaires.

[...]

Marge de dumping relative aux marchandises d'un exportateur

30.2 (1) Sous réserve du paragraphe (2), la marge de dumping relative à des marchandises d'un exportateur donné est égale à zéro ou, s'il est positif, au résultat obtenu en retranchant la moyenne pondérée du prix à l'exportation des marchandises de la moyenne pondérée de la valeur normale des marchandises.

[...]

Absence de modalités

30.4 (2) Si les règlements ne prévoient aucune façon d'établir le montant de subvention ou si, de l'avis du président, des renseignements suffisants ne sont pas fournis ou ne sont pas disponibles pour permettre la détermination du montant de subvention selon les modalités réglementaires, ce montant est, sous réserve du paragraphe (3), établi selon les modalités fixées par le ministre.

Exception

30.4 (3) Un montant de subvention ne peut comprendre un montant attribuable à une subvention ne donnant pas lieu à une action.

...

[...]

Initiation of investigation

31 (1) The President shall cause an investigation to be initiated respecting the dumping or subsidizing of any goods and whether there is a reasonable indication that such dumping or subsidizing has caused injury or retardation or is threatening to cause injury, forthwith on the President's own initiative or, subject to subsection (2), where the President receives a written complaint respecting the dumping or subsidizing of the goods, within thirty days after the date on which written notice is given by or on behalf of the President to the complainant that the complaint is properly documented, if the President is of the opinion that there is evidence

(a) that the goods have been dumped or subsidized; and

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

...

Final determination or termination

41 (1) Within 90 days after making a preliminary determination under subsection 38(1), the President shall

(a) terminate the investigation in respect of any goods of a particular

Ouverture d'enquête

31 (1) De sa propre initiative ou, sous réserve du paragraphe (2), s'il reçoit une plainte écrite concernant le dumping ou le subventionnement de marchandises, dans les trente jours suivant la date à laquelle il informe ou fait informer, par avis écrit, le plaignant que le dossier est complet, le président fait ouvrir une enquête portant sur le dumping ou le subventionnement des marchandises et sur la présence d'indications raisonnables que le dumping ou le subventionnement a causé un dommage ou un retard ou menace de causer un dommage, s'il est d'avis que des éléments de preuve indiquent, à la fois :

a) que les marchandises ont été sous-évaluées ou subventionnées;

b) de façon raisonnable que le dumping ou le subventionnement a causé un dommage ou un retard ou menace de causer un dommage.

[...]

Décision définitive ou clôture de l'enquête

41 (1) Dans les quatre-vingt-dix jours suivant sa décision provisoire rendue en vertu du paragraphe 38(1), le président, selon le cas :

a) clôt l'enquête au sujet des marchandises d'un exportateur

exporter if, on the available evidence, the President is satisfied that there has been no dumping or subsidizing of the goods or that the margin of dumping of, or amount of subsidy on, those goods is insignificant; and

(b) make a final determination of dumping or subsidizing in respect of the goods that are the subject of the investigation and for which the investigation has not been terminated under paragraph (a) if, on the available evidence, the President is satisfied that there has been dumping or subsidizing and the President shall specify, in relation to each exporter of goods in respect of which the investigation is made, as follows:

(i) in the case of dumped goods, the goods to which the determination applies and the margin of dumping of the goods, and

(ii) in the case of subsidized goods,

(A) the goods to which the determination applies,

(B) the amount of subsidy on the goods, and

(C) subject to subsection (2), if the whole or any part of the subsidy on the goods is a prohibited subsidy, the amount of the prohibited subsidy on the goods.

Exception

donné si, au vu des éléments de preuve disponibles, il est convaincu qu'il n'y a pas de dumping ou de subventionnement des marchandises ou que la marge de dumping ou le montant de subvention octroyée relativement aux marchandises est minimal;

b) rend une décision définitive de dumping ou de subventionnement concernant les marchandises visées par l'enquête et au sujet desquelles n'a pas eu lieu la clôture d'enquête prévue à l'alinéa a) si, au vu des éléments de preuve disponibles, il est convaincu qu'il y a eu dumping ou subventionnement; dans ce cas, le président précise, relativement à chacun des exportateurs de marchandises à l'égard desquelles l'enquête est menée, ce qui suit :

(i) dans le cas des marchandises sous-évaluées, les marchandises objet de la décision et leur marge de dumping,

(ii) dans le cas de marchandises subventionnées :

(A) les marchandises objet de la décision,

(B) le montant de subvention octroyée pour elles,

(C) sous réserve du paragraphe (2), lorsque tout ou partie de la subvention octroyée pour les marchandises est une subvention prohibée, le montant de toute subvention prohibée octroyée pour elles

Exception

41 (2) The President shall not specify anything under clause (1)(b)(ii)(C) if the President is of the opinion that, having regard to the country that is providing the export subsidy, the nature of the goods and the circumstances under which the export subsidy is provided, provision of the export subsidy in relation to those goods is not inconsistent with that country's obligations under the international agreement known as the General Agreement on Tariffs and Trade, 1994.

Notice of final determination

41 (3) Where the President makes a final determination of dumping or subsidizing in respect of goods, he shall cause notice that he has made the determination to be

(a) given and published as provided in paragraph 34(1)(a); and

(b) filed with the Tribunal in writing, stating the reasons therefor, together with such other material relating to the determination as may be required under the rules of the Tribunal.

Notice of termination

41 (4) Where the President causes an investigation respecting the dumping or subsidizing of any goods to be terminated pursuant to subsection (1) in respect of those goods, he shall cause notice of the termination to be

(a) given and published as provided in paragraph 34(1)(a); and

41 (2) Rien n'est précisé aux termes de la division (1)b)(ii)(C) si, eu égard au pays qui octroie la subvention à l'exportation, à la nature des marchandises et aux circonstances entourant l'octroi, le président est d'avis que cet octroi n'est pas contraire aux obligations de ce pays aux termes de l'accord international dénommé Accord général sur les tarifs douaniers et le commerce de 1994.

Avis de la décision définitive

41 (3) Dès qu'il rend la décision définitive prévue au paragraphe (1), le président :

a) en fait donner et publier avis selon les modalités prévues à l'alinéa 34(1)a);

b) en fait déposer auprès du Tribunal un avis motivé, accompagné des pièces requises en l'espèce par les règles du Tribunal.

Avis de clôture de l'enquête

41 (4) Dès qu'il fait clore une enquête conformément au paragraphe (1), le président :

a) en fait donner et publier avis selon les modalités prévues à l'alinéa 34(1)a);

(b) given in writing to the Tribunal.

b) en fait donner un avis écrit au Tribunal.

...

[...]

Tribunal to make inquiry

Enquête du Tribunal

42 (1) The Tribunal, forthwith after receipt of a notice of a preliminary determination under subsection 38(3), shall make inquiry with respect to the following matters:

42 (1) Dès réception de l'avis de décision provisoire prévu au paragraphe 38(3), le Tribunal fait enquête sur les questions ci-après, à savoir :

(a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods

a) si le dumping des marchandises en cause ou leur subventionnement :

(i) has caused injury or retardation or is threatening to cause injury, or

(i) soit a causé un dommage ou un retard ou menace de causer un dommage,

(ii) would have caused injury or retardation except for the fact that provisional duty was imposed in respect of the goods;

(ii) soit aurait causé un dommage ou un retard sans l'application de droits provisoires aux marchandises;

(b) in the case of any dumped goods to which the preliminary determination applies, as to whether

b) si, dans le cas de marchandises sous-évaluées objet de la décision provisoire :

(i) either

(i) d'une part :

(A) there has occurred a considerable importation of like goods that were dumped, which dumping has caused injury or would have caused injury except for the application of anti-dumping measures, or

(A) ou bien a eu lieu une importation considérable de marchandises similaires sous-évaluées dont le dumping a causé un dommage ou en aurait causé si des mesures antidumping n'avaient pas été prises,

(B) the importer of the goods was or should have been aware that the exporter was practising

(B) ou bien l'importateur des marchandises était ou aurait dû être au courant du dumping que pratiquait l'exportateur et du fait

dumping and that the dumping would cause injury, and

que ce dumping causerait un dommage,

(ii) injury has been caused by a massive importation of the goods into Canada and the goods are likely to seriously undermine the remedial effect of the duties applicable under subsection 3(1); and

(ii) d'autre part, un dommage a été causé par l'importation massive des marchandises et celles-ci sont susceptibles de compromettre gravement l'effet correctif des droits visés au paragraphe 3(1);

(c) in the case of any subsidized goods in respect of which a specification has been made under clause 41(1)(b)(ii)(C) and to which the preliminary determination applies as to whether

c) si, dans le cas de marchandises subventionnées, pour lesquelles un montant a été précisé en application de la division 41(1)(b)(ii)(C), objet de la décision provisoire :

(i) injury has been caused by a massive importation of the goods into Canada, and

(i) d'une part, un dommage a été causé par l'importation massive des marchandises,

(ii) the goods are likely to seriously undermine the remedial effect of the duties applicable under subsection 3(1).

(ii) d'autre part, elles sont susceptibles de compromettre gravement l'effet correctif des droits visés au paragraphe 3(1).

...

[...]

President may require evidence to be provided

Demande d'éléments de preuve

78 (1) Where,

78 (1) Dans les cas où :

(a) in any proceeding undertaken by the President after notice has been given that the complaint is properly documented but before the initiation of an investigation or in any investigation under this Act respecting the dumping or subsidizing of goods, or

a) dans le cadre d'une procédure qu'il engage après qu'un avis est donné pour indiquer que le dossier est complet, mais avant l'ouverture d'une enquête, ou dans le cadre d'une enquête de dumping ou de subventionnement;

(b) in relation to the sale of

b) à l'égard d'une vente :

(i) any goods to an importer in Canada, or

(i) soit de marchandises à un importateur se trouvant au Canada,

(ii) any goods located or in the course of production out of Canada,

(ii) soit de marchandises qui se trouvent à l'étranger ou qui y sont en cours de production,

that are of the same description as goods to which an order or finding of the Tribunal described in section 3, 5 or 6 applies and that will or may be imported into Canada,

qui sont de même description que celles auxquelles s'applique une ordonnance ou des conclusions du Tribunal visées aux articles 3, 5 ou 6 et qui seront ou pourraient être importées au Canada,

the President believes on reasonable grounds that any person in Canada is able to provide evidence relevant to any proceedings undertaken by the President before the initiation of an investigation, to the investigation or to the making, for the purpose of facilitating the administration or enforcement of this Act, of an estimate of the duty that will or may be payable on the goods when imported into Canada, the President may, by notice in writing, require the person to provide the President, under oath or otherwise, with the evidence referred to in the notice.

il a des motifs raisonnables de croire qu'une personne se trouvant au Canada est en mesure de fournir des éléments de preuve utiles à la procédure engagée par lui avant d'ouvrir une enquête ou utiles à l'enquête ou, pour faciliter l'application de la présente loi, à l'estimation des droits payables ou éventuellement payables sur les marchandises, le président peut, par avis écrit, exiger d'elle qu'elle fournisse les éléments précisés à l'avis sous la foi du serment ou autrement.

...

[...]

President may gather information in advance

Collecte de renseignements à l'avance

96 In order to facilitate the administration and enforcement of this Act, where the President believes that goods sold to an importer in Canada or goods located or in the course of production out of Canada are or may be of the same description as goods to which an order or finding of the Tribunal described in section 3, 5 or 6 applies and that they will or

96 Dans les cas où il croit que des marchandises qui sont vendues à un importateur se trouvant au Canada ou qui se trouvent à l'étranger ou y sont en cours de production sont ou pourraient être de même description que celles qui font l'objet d'une ordonnance ou de conclusions rendues aux termes des articles 3, 5 ou 6 et qu'elles seront ou pourraient

may be imported into Canada, the President may, for the purpose of estimating the margin of dumping of or the amount of subsidy on the goods before they are imported into Canada, seek from persons in or out of Canada, in such manner and form as he considers appropriate in the circumstances, such information as he believes will be useful for that purpose.

être importées au Canada, le président peut, pour faciliter l'application de la présente loi, recueillir auprès de personnes se trouvant au Canada ou à l'étranger, selon les modalités qu'il juge indiquées, des renseignements qu'il croit utiles à l'estimation de la marge de dumping des marchandises ou du montant de subvention octroyée pour elles avant qu'elles ne soient importées.

Application for judicial review

96.1 (1) Subject to section 77.012 or 77.12, an application may be made to the Federal Court of Appeal to review and set aside

(a) a decision of the President under paragraph 41(1)(a);

(b) a final determination of the President under paragraph 41(1)(b);

...

Grounds of application

96.1 (2) An application may be made under this section on the ground that the President or the Tribunal, as the case may be,

(a) acted without jurisdiction, acted beyond the jurisdiction of the President or the Tribunal or refused to exercise that jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that the

Demande

96.1 (1) Sous réserve des articles 77.012 et 77.12, une demande de révision et d'annulation peut être présentée à la Cour d'appel fédérale relativement aux décisions, ordonnances ou conclusions suivantes :

a) la décision rendue par le président au titre de l'alinéa 41(1)a);

b) la décision définitive rendue par le président au titre de l'alinéa 41(1)b);

[...]

Motifs

96.1 (2) La demande peut être présentée pour l'un ou l'autre des motifs suivants :

a) le président ou le Tribunal a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) il n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute procédure

President or the Tribunal was required by law to observe;

qu'il était légalement tenu de respecter;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

c) il a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(d) based a decision or order on an erroneous finding of fact that the President or the Tribunal made in a perverse or capricious manner or without regard for the material before the President or the Tribunal;

d) il a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

e) il a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.

f) il a agi de toute autre façon contraire à la loi.

...

[...]

Disposition

Décision de la Cour

96.1 (6) On an application under this section, the Federal Court of Appeal may dismiss the application, set aside the final determination, decision, order or finding, or set aside the final determination, decision, order or finding and refer the matter back to the President or the Tribunal, as the case may be, for determination in accordance with such directions as it considers appropriate.

96.1 (6) La cour peut soit rejeter la demande, soit annuler la décision, l'ordonnance ou les conclusions avec ou sans renvoi de l'affaire au président ou au Tribunal, selon le cas, pour qu'il y donne suite selon les instructions qu'elle juge indiquées.

IX. ANNEX B – Special Import Measures Regulations, S.O.R./84-927 (SIMR)

11 (1) For the purposes of paragraph 19(b) and sub-paragraph 20(1)(c)(ii) of the Act,

(a) subject to sections 11.2 and 12, the expression cost of production, in relation to any goods, means the aggregate of all costs that are

(i) attributable to, or in any manner related to, the production of the goods, or

(ii) directly attributable to the design or engineering of the goods;

(b) the expression a reasonable amount for profits, in relation to any goods, means an amount equal to

(i) where the exporter has made in the country of export a number of sales of like goods for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a proper comparison, the weighted average profit made on the sales,

(ii) where subparagraph (i) is not applicable but the exporter has made in the country of export a number of sales of goods that are of the same general category as the goods sold to the importer in Canada and are for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a proper comparison, the

11 (1) Pour l'application de l'alinéa 19b) et du sous-alinéa 20(1)c)(ii) de la Loi,

a) sous réserve des articles 11.2 et 12, le terme coût de production désigne l'ensemble :

(i) des coûts attribuables ou liés à la production des marchandises, ou

(ii) des coûts directs des travaux de conception ou d'ingénierie nécessaires à la production des marchandises;

b) le terme un montant raisonnable pour les bénéfices désigne un montant égal :

(i) si l'exportateur a effectué dans le pays d'exportation un nombre de ventes de marchandises similaires qui sont destinées à être utilisées dans ce pays, lesquelles ventes ont dans l'ensemble produit des bénéfices et permettent une comparaison utile, à la moyenne pondérée des bénéfices réalisés sur ces ventes,

(ii) si le sous-alinéa (i) n'est pas applicable, mais que l'exportateur a effectué dans le pays d'exportation un nombre de ventes de marchandises qui sont de la même catégorie générale que celles vendues à l'importateur se trouvant au Canada et qui sont destinées à être utilisées dans le pays d'exportation, lesquelles ventes ont dans l'ensemble

weighted average profit made on the sales,

(iii) where subparagraphs (i) and (ii) are not applicable but producers, other than the exporter, have made in the country of export a number of sales of like goods for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a proper comparison, the weighted average profit made on the sales,

(iv) where subparagraphs (i) to (iii) are not applicable but producers, other than the exporter, have made in the country of export a number of sales of goods that are of the same general category as the goods sold to the importer in Canada and are for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a proper comparison, the weighted average profit made on the sales,

(v) where subparagraphs (i) to (iv) are not applicable but the exporter has made in the country of export a number of sales of goods that are of the group or range of goods that is next largest to the category referred to in subparagraph (iv) and are for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a

produit des bénéfiques et permettent une comparaison utile, à la moyenne pondérée des bénéfiques réalisés sur ces ventes,

(iii) si les sous-alinéas (i) et (ii) ne sont pas applicables, mais que des producteurs, autres que l'exportateur, ont effectué dans le pays d'exportation un nombre de ventes de marchandises similaires qui sont destinées à être utilisées dans ce pays, lesquelles ventes ont dans l'ensemble produit des bénéfiques et permettent une comparaison utile, à la moyenne pondérée des bénéfiques réalisés sur ces ventes,

(iv) si les sous-alinéas (i) à (iii) ne sont pas applicables, mais que des producteurs, autres que l'exportateur, ont effectué dans le pays d'exportation un nombre de ventes de marchandises qui sont de la même catégorie générale que celles vendues à l'importateur se trouvant au Canada et qui sont destinées à être utilisées dans le pays d'exportation, lesquelles ventes ont dans l'ensemble produit des bénéfiques et permettent une comparaison utile, à la moyenne pondérée des bénéfiques réalisés sur ces ventes,

(v) si les sous-alinéas (i) à (iv) ne sont pas applicables, mais que l'exportateur a effectué dans le pays d'exportation un nombre de ventes de marchandises qui sont de la gamme ou du groupe suivant qui comprend la catégorie visée au sous-alinéa (iv) et qui sont destinées à être utilisées dans ce pays, lesquelles ventes ont dans l'ensemble produit des bénéfiques

proper comparison, the weighted average profit made on the sales, or

(vi) where subparagraphs (i) to (v) are not applicable but producers, other than the exporter, have made in the country of export a number of sales of goods that are of the group or range of goods that is next largest to the category referred to in subparagraph (iv) and are for use in the country of export, and where those sales when taken together produce a profit and are such as to permit a proper comparison, the weighted average profit made on the sales; and

(c) the expression a reasonable amount for administrative, selling and all other costs, in relation to any goods, means (i) an amount equal to all administrative, selling and other costs, including the costs of any warranty against defect or guarantee of performance and any design or engineering costs, that are not included in the cost of production but are reasonably attributable to the production and domestic sales of like goods made by the exporter, that satisfy the greatest number of the conditions set out in paragraphs 15(a) to (e) of the Act, taking into account subsection 16(1) of the Act, or (ii) where an amount cannot be determined under subparagraph (i), an amount equal to all administrative, selling and other costs, including the costs of any warranty against defect or guarantee of performance and any design or engineering costs, that are not included in the cost of

et permettent une comparaison utile, à la moyenne pondérée des bénéfices réalisés sur ces ventes;

(vi) si les sous-alinéas (i) à (v) ne sont pas applicables, mais que des producteurs, autres que l'exportateur, ont effectué dans le pays d'exportation un nombre de ventes de marchandises qui sont de la gamme ou du groupe suivant qui comprend la catégorie visée au sous-alinéa (iv) et qui sont destinées à être utilisées dans ce pays, lesquelles ventes ont dans l'ensemble produit des bénéfices et permettent une comparaison utile, à la moyenne pondérée des bénéfices réalisés sur ces ventes;

c) le terme un montant raisonnable pour les frais, notamment les frais administratifs et les frais de vente désigne : (i) un montant égal à l'ensemble des frais administratifs, des frais de vente et autres frais, notamment le coût de toute garantie contre les vices de fabrication ou de toute garantie de fonctionnement et les coûts des travaux de conception ou d'ingénierie, qui ne sont pas compris dans le coût de production, mais qu'il est raisonnable d'attribuer à la production et aux ventes intérieures de marchandises similaires par l'exportateur qui satisfont au plus grand nombre de conditions énoncées aux alinéas 15a) à e) de la Loi, compte tenu du paragraphe 16(1) de la Loi, (ii) s'il est impossible de déterminer le montant visé au sous-alinéa (i), un montant égal à l'ensemble des frais administratifs, des frais de vente et autres frais, notamment le coût de toute garantie contre les vices de fabrication ou de toute garantie de

production but are reasonably attributable to the production and sale of the goods.

fonctionnement et les coûts des travaux de conception ou d'ingénierie, qui ne sont pas compris dans le coût de production, mais qu'il est raisonnable d'attribuer à la production et à la vente des marchandises.

11 (2) For the purposes of subparagraphs (1)(b)(i), (ii) and (v), where the exporter is not the producer of the goods referred to in those subparagraphs, a reasonable amount for profits shall also include the amount of profits earned by the producer and any subsequent vendors in respect of sales of those goods to the exporter.

11 (2) Pour l'application des sous-alinéas (1)b)(i), (ii) et (v), lorsque l'exportateur n'est pas le producteur des marchandises visées à ces sous-alinéas, un montant raisonnable pour les bénéfices comprend également les bénéfices que le producteur et les vendeurs subséquents ont tirés de la vente des marchandises à l'exportateur.

11 (3) For the purpose of subparagraph (1)(c)(i), where the exporter is not the producer of the goods referred to in that subparagraph, a reasonable amount for administrative, selling and all other costs shall also include the amounts incurred by the producer and any subsequent vendors in respect of sales of those goods to the exporter.

11 (3) Pour l'application du sous-alinéa (1)c)(i), lorsque l'exportateur n'est pas le producteur des marchandises visées à ce sous-alinéa, un montant raisonnable pour les frais, notamment les frais administratifs et les frais de vente, comprend également les frais engagés par le producteur et les vendeurs subséquents pour la vente des marchandises à l'exportateur.

...

[...]

11.1 For the purpose of subsection 16(3) of the Act,

11.1 Pour l'application du paragraphe 16(3) de la Loi :

(a) the cost of production, in relation to any goods, shall, subject to subsection 11.2(1) and section 12, be calculated by aggregating all costs that are

a) sous réserve du paragraphe 11.2(1) et de l'article 12, le coût de production de marchandises est égal à la somme des montants suivants :

(i) attributable to, or in any manner related to, the production of the goods, or

(i) l'ensemble des coûts attribuables ou liés à la production des marchandises,

(ii) directly attributable to the design or engineering of the goods; and

(ii) l'ensemble des coûts directs des travaux de conception ou d'ingénierie nécessaires à la production des marchandises;

(b) the administrative, selling and all other costs, in relation to any goods, shall be calculated by aggregating all administrative, selling and other costs, including the cost of any warranty against defect or guarantee of performance and any design or engineering costs that are not included in the cost of production but are attributable to the production and sale of the goods.

b) les frais afférents, notamment les frais administratifs et les frais de vente correspondent à l'ensemble des frais administratifs, des frais de vente et autres frais, notamment le coût de toute garantie contre les vices de fabrication ou de toute garantie de fonctionnement et les coûts des travaux de conception ou d'ingénierie qui ne sont pas compris dans le coût de production, mais qui sont attribuables à la production et à la vente des marchandises.

...

[...]

11.2 (1) For the purposes of subparagraphs 11(1)(a)(i) and 11.1(a)(i), if an input used in the production of the goods is acquired by the exporter or producer from an associated person and is a significant factor in the production of the goods, the cost of that input in the country of export is considered to be the greater of the following amounts:

11.2 (1) Pour l'application des sous-alinéas 11(1)a(i) et 11.1a(i), lorsqu'un intrant qui est un facteur important dans la production des marchandises est acquis d'une personne associée par l'exportateur ou le producteur, le coût de cet intrant dans le pays d'exportation est réputé être le plus élevé des montants suivants :

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

a) le prix payé pour l'intrant par l'exportateur ou le producteur à la personne associée;

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

b) le coût supporté par la personne associée pour la production de l'intrant, y compris les frais afférents, notamment les frais administratifs et les frais de vente;

(i) the selling prices of those inputs in the country of export, in the same or substantially the same

(i) soit des prix de vente dans le pays d'exportation entre des parties qui ne sont pas des personnes associées, pour des

quantities, between parties who are not associated persons, or

(ii) the published prices of those inputs in the country of export.

11.2 (2) For the purposes of subparagraph 11(1)(a)(i), if the President is of the opinion that, under paragraph 16(2)(c) of the Act, a particular market situation exists which does not permit a proper comparison of the sale of like goods with the sale of the goods to the importer in Canada, such that the acquisition cost of an input used in the production of the goods does not reasonably reflect the actual cost of that input, the cost of that input in the country of export shall be considered to be the first of the following amounts that reasonably reflects the actual cost of the input so as to permit a proper comparison:

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

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

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

(d) the price of the same or substantially the same inputs that are produced in a third country and

quantités égales ou sensiblement égales,

(ii) soit des prix publiés dans le pays d'exportation.

11.2 (2) Pour l'application du sous-alinéa 11(1)a(i), si le président est d'avis qu'il existe, aux termes de l'alinéa 16(2)c de la Loi, une situation particulière du marché qui ne permet pas une comparaison utile de la vente de marchandises similaires avec la vente des marchandises à l'importateur au Canada et qui fait en sorte que le coût d'acquisition d'un intrant ne tient pas compte raisonnablement de son coût réel, le coût de l'intrant dans le pays d'exportation est considéré être le premier des montants ci-après qui tient raisonnablement compte du coût réel de l'intrant, pour permettre une comparaison utile :

a) le prix d'intrants identiques — ou sensiblement identiques — produits dans le pays d'exportation et vendus à l'exportateur ou à un autre producteur dans le pays d'exportation;

b) le prix d'intrants identiques — ou sensiblement identiques — produits dans le pays d'exportation et vendus à partir du pays d'exportation à un pays tiers;

c) le prix d'intrants identiques — ou sensiblement identiques — établi sur la base des prix publiés dans le pays d'exportation;

d) le prix d'intrants identiques — ou sensiblement identiques — produits dans un pays tiers et

sold to the exporter or to other producers in the country of export, adjusted to reflect the differences relating to price comparability between the third country and the country of export; or

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

...

12 For the purposes of subparagraphs 11(1)(a)(ii) and 11.1(a)(ii), where the costs that are directly attributable to the design or engineering of the goods (in this section referred to as “first-mentioned goods”) cannot be determined, but the costs that are directly attributable to the design or engineering of goods of the same general category as the first-mentioned goods, produced and sold by any exporter or producer, can be determined, the costs that are directly attributable to the design or engineering of the first-mentioned goods shall be considered to be the amount that reflects the cost of the design or engineering of the goods of the same general category, such amount being adjusted to reflect the value of any differences in the design or engineering between the first-mentioned goods and the goods of the same general category.

...

vendus à l’exportateur ou à un autre producteur dans le pays d’exportation, rectifié pour tenir compte des différences en ce qui a trait à la comparabilité des prix dans le pays tiers et dans le pays d’exportation;

e) le prix d’intrants identiques — ou sensiblement identiques — établi sur la base des prix publiés à l’extérieur du pays d’exportation, rectifié pour tenir compte des différences en ce qui a trait à la comparabilité des prix avec le pays d’exportation.

[...]

12 Pour l’application des sous-alinéas 11a)(1)(ii) et 11.1a)(ii), si les coûts directs des travaux de conception ou d’ingénierie nécessaires à la production des marchandises (appelées dans le présent article « marchandises mentionnées en premier lieu ») ne peuvent être établis, mais que de tels coûts peuvent être établis pour des marchandises de la même catégorie générale qui sont produites et vendues par un exportateur ou producteur, les coûts relatifs aux marchandises mentionnées en premier lieu sont considérés comme étant équivalents aux coûts des travaux de conception ou d’ingénierie propres aux marchandises de la même catégorie générale, rectifiés pour tenir compte de la valeur de toute différence entre ces travaux et ceux propres aux marchandises mentionnées en premier lieu.

[...]

13 For the purposes of paragraph 11(1)(b),

(a) sales that are such as to permit a proper comparison are sales, other than any sale referred to in subsection 16(2) of the Act, that satisfy the greatest number of the conditions set out in paragraphs 15(a) to (e) of the Act, taking into account subsection 16(1) of the Act;

(b) the price of like goods shall be adjusted in the manner provided for in sections 3 to 10; and

(c) the price of goods of the same general category or of goods of the group or range of goods that is next largest to the category referred to in subparagraph 11(1)(b)(iv) shall be adjusted in the manner provided for in sections 3 to 10, and for that purpose the expression “like goods” shall be read as “goods of the same general category” or “goods of the group or range of goods that is next largest to the category referred to in subparagraph 11(1)(b)(iv)”, as the case may be, wherever that expression occurs in those sections.

...

13.1 (1) Subject to subsection (2), for the purpose of section 23.1 of the Act, the cost of production of goods, and the administrative, selling and all other costs with respect to the goods, for a start-up period of production shall be determined in accordance with sections 11 and 11.1.

13.1 (2) Where any of the costs determined under subsection (1) are

13 Pour l’application de l’alinéa 11(1)b) :

a) les ventes qui permettent une comparaison utile sont les ventes, autres que celles visées au paragraphe 16(2) de la Loi, qui satisfont au plus grand nombre de conditions énoncées aux alinéas 15(a) à e) de la Loi, compte tenu du paragraphe 16(1) de la Loi;

b) le prix des marchandises similaires est rectifié de la manière prévue aux articles 3 à 10;

c) le prix des marchandises de la même catégorie générale ou des marchandises de la gamme ou du groupe suivant qui comprend la catégorie visée au sous-alinéa 11(1)b)(iv) est rectifié de la manière prévue aux articles 3 à 10 et, à cette fin, les mentions dans ces articles de « marchandises similaires » valent mention de « marchandises de la même catégorie générale » ou de « marchandises de la gamme ou du groupe suivant qui comprend la catégorie visée au sous-alinéa 11(1)b)(iv) », selon le cas.

[...]

13.1 (1) Sous réserve du paragraphe (2), pour l’application de l’article 23.1 de la Loi, le coût de production des marchandises et les autres frais afférents pour la période de démarrage de la production, notamment les frais administratifs et les frais de vente, sont déterminés conformément aux articles 11 et 11.1.

13.1 (2) Si le coût ou les frais déterminés selon le paragraphe (1)

affected by start-up operations that limit the level of production associated with the initial phases of commercial production owing to technical difficulties during the start-up period of production that are related to the use of new production facilities or the production of a new or substantially different product, the affected costs shall be adjusted on the basis of the costs that exist at the end of the start-up period of production or, if the period extends beyond the investigation period, on the basis of the costs that exist at the end of that period.

sont touchés par des activités de démarrage qui limitent le niveau de production durant les phases initiales de la production commerciale, en raison des difficultés techniques causées, durant la période de démarrage de la production, par l'utilisation de nouvelles installations de production ou la production d'un produit nouveau ou sensiblement différent, ils sont rectifiés selon le coût ou les frais applicables à la fin de cette période ou, si celle-ci dépasse la période visée par l'enquête, selon ceux qui sont applicables à la fin de cette dernière.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-52-21

STYLE OF CAUSE:

CANADIAN HARDWOOD
PLYWOOD AND VENEER
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FOREST PRODUCTS,
ROCKSHIELD ENGINEERED
WOOD PRODUCTS ULC and
HUSKY PLYWOOD (A
DIVISION OF
COMMONWEALTH PLYWOOD
COMPANY LIMITED) v.
ATTORNEY GENERAL OF
CANADA, LINYI CELTIC WOOD
CO., LTD., CELTIC CO., LTD.,
LINYI EVERGREEN WOOD CO.,
LTD., LINYI HUASHENG
YONGBIN WOOD CO., LTD.,
LINYI JIAHE WOOD INDUSTRY
CO., PINGYI JINNIU WOOD CO.,
LTD., PIZHOU JIANGSHAN
WOOD CO., LTD., SHANDONG
GOOD WOOD IMP. AND EXP.
CO., LTD., XUZHOU
SHENGPING IMP AND EXP CO.,
LTD., XUZHOU LONGYUAN
WOOD INDUSTRY CO., LTD.,
FENGXIAN WEIHENG WOOD
CO., LTD., ZHEJIANG DEHUA
TB IMPORT & EXPORT CO.,
LTD, DEHUA TB NEW
DECORATION MATERIAL CO.,
LTD., UNITED STEEL
WORKERS, UNIFOR and
ASSOCIATION DES SALARIÉS
DU CONTRE-PLAQUÉ DE STE-
THÉRÈSE

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RIVOALEN J.A.

CONCURRED IN BY:

GAUTHIER J.A.
ROUSSEL J.A.

DATED:

APRIL 5, 2023

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