Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2012-035

Canadian Tire Corporation, Limited

v.

President of the Canada Border Services Agency

Decision and reasons issued Wednesday, October 29, 2014

Canada

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IN THE MATTER OF an appeal heard on July 17, 2014, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF 51 decisions of the President of the Canada Border Services Agency, dated June 14, 2012, issued pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

CANADIAN TIRE CORPORATION, LIMITED **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Daniel Petit
Daniel Petit
Member

Ann Penner
Ann Penner
Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	July 17, 2014
Tribunal Members:	Pasquale Michaele Saroli, Presiding Member Daniel Petit, Member Ann Penner, Member
Counsel for the Tribunal:	Carrie Vanderveen Cassandra Baker (student-at-law)
Registrar Officer:	Ekaterina Pavlova

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Canadian Tire Corporation, Limited	Riyaz Dattu Eric Morgan

Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Andrew Gibbs Kirk G. Shannon

WITNESSES:

Phil Williams Manager, Customs Canadian Tire Retail	Patricia Cervoni Customs Compliance Auditor (retired) Canadian Tire Corporation, Limited
Soren Dumrath Canadian Representative Mobicool International Limited	Rand McNally Manager, Trade and Anti-dumping Programs Directorate Canada Border Services Agency

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Canadian Tire Corporation, Limited (CTC) under section 61 of the *Special Import Measures Act*[1] from decisions made on June 14, 2012, by the President of the Canada Border Services Agency (CBSA) (the President), pursuant to section 59.

PROCEDURAL HISTORY

2. During the period from September 2010 to June 2011,[2] CTC purchased a number of different models of thermoelectric containers (TECs) (the goods in issue) from Mobicool International Limited (Mobicool) of the People's Republic of China (China). These TECs were subject to anti-dumping (AD) and countervailing (CV) duties imposed as a result of a 2008 injury finding by the Canadian International Trade Tribunal (the Tribunal) with respect to TECs.[3]

3. On November 25, 2010, normal values (NVs), export prices (EPs) and amounts of subsidy applicable to the TECs in issue were updated pursuant to the CBSA's 2010 re-investigation.[4]

4. On various dates in 2011, CTC completed self-assessments and paid the resulting AD duties on the goods in issue. These self-assessments were based on NVs established by the CBSA in its 2010 re-investigation, with NVs converted to Canadian dollars using the prevailing rate of exchange *vis-à-vis* Chinese renminbi on the purchase order (PO) dates for the goods in issue.[5]

5. On October 3, 2011, the CBSA informed CTC that it had initiated another re-investigation (the 2011-2012 re-investigation) of NVs, EPs and amounts of subsidy applicable to the TECs in issue.[6]

6. On November 17, 2011, a CBSA designated officer issued a re-determination of CTC's self-assessments, pursuant to paragraph 57(*b*) of *SIMA* and subsection 44(1) of the *Special Import Measures Regulations*,[7] using information collected during the 2010 re-investigation and the prevailing rate of exchange for currency conversion purposes on the dates of shipment rather than the PO dates.[8]

7. On February 7, 2012, CTC filed blanket requests[9] with the CBSA for a re-calculation of AD duties using the PO dates rather than the dates of shipment as the "date of sale".[10]

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1. R.S.C., 1985, c. S-15 [*SIMA*].
2. Exhibit AP-2012-035-19D, tab 14, Vol. 1B.
3. *Thermoelectric Containers* (11 December 2008), NQ-2008-002 (CITT).
4. In an effort to maintain up-to-date figures, the CBSA conducts periodic administrative reviews (i.e. re-investigations) of NVs, EPs and amounts of subsidy applicable to imported goods subject to a positive Tribunal order/finding). The results of a re-investigation are based on data pertaining to the one-year period immediately preceding the date of initiation of the re-investigation, with revised NVs established during the re-investigation normally being applied to goods released on or after the date of the conclusion of the re-investigation. However, the CBSA also applies NVs that have been determined through the re-investigation process to imported goods that have yet to be re-determined at the time of the conclusion of a re-investigation.
5. Exhibit AP-2012-035-19A at para. 6, Vol. 1B.
6. *Ibid*. at para. 12.
7. S.O.R./84-927 [*Regulations*].
8. Exhibit AP-2012-035-19A at paras. 7, 11, Vol. 1B.
9. Memorandum D14-1-3 (1 October 2008), "Procedures for Making a Request for a Re-determination or an Appeal of Goods under the *Special Import Measures Act*", explains, at paragraph 50, that a blanket request is "a procedure through which an importer may request re-determinations on more than one transaction under specific conditions . . . . Under the blanket request procedure, . . . the same decision is issued with respect to each transaction included in the request." Exhibit AP-2012-035-19D, tab 8, Vol. 1B.
10. Exhibit AP-2012-035-19A at para. 8, Vol. 1B; Exhibit AP-2012-035-19C (protected), tab 2, Vol. 2A.

8. On March 1, 2012, the CBSA released the results of its 2011-2012 re-investigation.[11] In this re-investigation, the NVs for certain TECs were determined pursuant to paragraph 19(*b*) of *SIMA*, which resulted in the NVs for the second 60-day period being significantly higher than those for other periods.[12]

9. On March 14, 2012, the CBSA sent a letter to Mobicool indicating that it had recalculated the NV for an additional TEC model pursuant to paragraph 19(*b*) of *SIMA* rather than section 15.

10. In response to CTC's blanket requests, the CBSA, on June 14, 2012, issued a notice of re-determination under the purported authority of section 59 of *SIMA*. This notice indicated that the re-determination used the PO date as the date of sale and updated NVs emanating from the 2011-2012 re-investigation (i.e. the CBSA used the updated sales and cost data from the 2011-2012 re-investigation to calculate the NVs applicable to the goods in issue imported during that period).[13] The notice also informed CTC of the net amount of AD duties owing; this amount included a refund for changes made to the dates of sale.[14]

11. On September 10, 2012, CTC filed its notice of appeal with the Tribunal.

12. On November 19, 2012, CTC requested that the deadline for the filing of the appellant's brief be extended to January 31, 2013, in order to allow its request for information under the *Access to Information Act*,[15] which it claimed was relevant to the appeal, to be processed.[16] The Tribunal granted this request on November 26, 2012.

13. On January 31, 2013, CTC requested a further extension of time until April 2, 2013, to file the appellant's brief, indicating that its request under the *Access to Information Act* had not yet yielded all the information required to determine the basis of assessment, and adding that the parties were still exploring prospects for a full or partial settlement of the matter.[17] On February 1, 2013, the Tribunal granted this further request and extended the deadline for the filing of the appellant's brief to April 2, 2013.

14. On April 10, 2013, CTC requested that the Tribunal order/direct the CBSA to disclose nine exhibits and two summaries, a request that the CBSA opposed.[18] It also requested the postponement of the filing of the appellant's brief until after the full resolution of its request for disclosure.[19]

15. On May 6, 2013, the Tribunal reserved judgment on CTC's request for disclosure pending the filing of briefs and supporting documentation.[20]

16. After each party filed its brief, CTC again requested, on September 27, 2013, that the Tribunal order the CBSA to disclose nine specific exhibits referenced in the CBSA's re-investigation completed on March 1, 2012, and certain calculation spreadsheets. On October 11, 2013, the CBSA replied that it was prepared to

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11. Exhibit AP-2012-035-19A at para. 12, Vol. 1B; Exhibit AP-2012-035-19C (protected), tab 9, Vol. 2A.
12. Exhibit AP-2012-035-35 at paras. 11-12, Vol. 1C; Exhibit AP-2012-035-19C (protected), tab 10, Vol. 2A.
13. Exhibit AP-2012-035-19F, Vol. 1B.
14. *Ibid.*; Exhibit AP-2012-035-44A (protected), Vol. 2B.
15. R.S.C., 1985, c. A-1.
16. Exhibit AP-2012-035-04, Vol. 1.
17. Exhibit AP-2012-035-06, Vol. 1.
18. Exhibit AP-2012-035-10, Vol. 1.
19. Exhibit AP-2012-035-09, Vol. 1.
20. Exhibit AP-2012-035-16, Vol. 1. In its decision, the Tribunal noted that, pursuant to rule 35 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, the CBSA is required to serve and file a detailed written response to CTC's brief, which must include all material facts, arguments and supporting documents upon which it intends to rely.

disclose the information requested by CTC, subject to conditions to maintain the confidentiality of the disclosed information.

17. On October 29, 2013, the Tribunal ordered the CBSA to disclose the nine exhibits and the spreadsheets requested by CTC, which it did on November 1, 2013.

18. On November 15, 2013, the Tribunal directed CTC to file, by no later than November 22, 2013, further written submissions specifying its claims of error by the CBSA.

19. On November 20, 2013, CTC requested that the deadline for filing its additional submission specifying the claims of error be extended to December 30, 2013, in order, *inter alia*, to afford it sufficient time to analyze the voluminous evidence filed by the CBSA on November 1, 2013. On November 22, 2013, the Tribunal granted the extension requested by CTC and cancelled the December 12, 2013, hearing date. CTC filed a supplemental brief on December 30, 2013, and the CBSA filed its response on January 30, 2014.

20. On February 28, 2014, the Tribunal held a pre-hearing telephone conference to clarify the issues in the appeal and to discuss matters relating to the conduct of the hearing itself (e.g. the number of witnesses who would be called to testify by each party).

21. On March 4, 2014, the Tribunal, in a follow-up to the telephone conference, invited CTC to file a final supplementary written submission by no later than April 1, 2014. The Tribunal directed CTC to limit this additional submission to a listing of specific claims of error (which had to be tied to allegations raised in submissions already on the record) and support each with a concise explanation of the basis of the allegation, drawing from information already on the record.[21]

22. On March 25, 2014, CTC requested that the April 1, 2014, deadline for the filing of its additional submission be extended by 14 days and also informed the Tribunal that it was still trying to confirm the availability of its potential witnesses for the July 10, 2014, hearing date. The Tribunal denied this further extension request on March 26, 2014.

23. On May 26, 2014, CTC requested that the July 10, 2014, hearing date be rescheduled because of the unavailability on that date of a key witness.

24. On May 30, 2014, the Tribunal, after expressing its frustration with the repeated delays in this case, asked the parties to cooperate in arriving at an acceptable final hearing date in July 2014.

25. On June 2, 2014, the Tribunal was informed that a July 17, 2014, hearing would be convenient for both parties, and the Tribunal fixed the new hearing date accordingly.

POSITIONS OF THE PARTIES

CTC

26. CTC argued that, in making its request to the CBSA for a correction of the dates for the applicable exchange rate, it was not seeking a re-determination under section 58 of *SIMA* of the NVs, EPs or subjectivity. Rather, it was seeking to correct exchange rate data that the CBSA should have treated as a request to correct a clerical or arithmetic error under subsection 12(2).[22]

21. Exhibit AP-2012-035-43, Vol. 1D.
22. Exhibit AP-2012-035-60 at paras. 2-10, Vol. 1D.

27. In this respect, CTC submitted that the calculation and retroactive administration of NVs by the CBSA were unreasonable, incorrect and punitive. With regard to the construction of NVs, CTC argued that the CBSA, by including sales of a TEC model not comparable to those sold to CTC, by including sales not made in the "ordinary course of trade" and by restricting itself to data for a discrete 60-day period, failed to correctly calculate a reasonable amount for profit.[23] CTC further argued that the significant changes in profits from one period to another provided further evidence of the unreasonableness of the CBSA's methodology.[24]

28. Finally, CTC submitted that the CBSA bears the onus of proving the correctness of the NVs.[25]

CBSA

29. As a preliminary matter, the CBSA argued that CTC had introduced new allegations of fact and substantive argument drawn from information extraneous to the existing record in its additional supplemental brief, contrary to the Tribunal's directions of March 4, 2014.[26]

30. In response to CTC's argument regarding subsection 12(2) and section 58 of *SIMA*, the CBSA submitted that the existing record showed that CTC had explicitly appealed the section 57 re-determination under section 58 and that, in any event, subsection 12(2) was not applicable in the circumstances of this case.[27]

31. The CBSA argued that its conduct in making the re-determination under section 59 of *SIMA* and the calculation of NVs were reasonable, claiming, in this regard, that the amount for profit was determined in accordance with subparagraph 11(1)(*b*)(ii) of the *Regulations* and that it did not have discretion to disregard profits actually earned in the Chinese market.[28] In particular, it submitted that, in calculating an amount for profit, it had considered sales of TEC models in the same general category as those sold to CTC.[29] It further submitted that the purchaser's reason for entering into a sale had no bearing on whether that sale was made in the ordinary course of trade.[30]

32. Finally, the CBSA argued that CTC bears the onus of proving that the NVs used by the CBSA were incorrect.[31]

TRIBUNAL'S ANALYSIS

Preliminary Matter

33. As a preliminary matter, the CBSA requested that the Tribunal refuse to consider new allegations of fact and argument raised by CTC in its additional supplemental brief which, it argued, were drawn from information "extraneous to the existing record", in contravention of the Tribunal's directions of March 4, 2014. In particular, the CBSA alleged that CTC had raised new alleged facts and arguments relating to why the TC-14 model of TEC was not comparable to the TECs purchased by CTC and why certain sales were not in the ordinary course of trade.[32]

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23. *Ibid.* at paras. 15-17.
24. *Ibid.* at para. 18; Exhibit AP-2012-035-35 at para. 10, Vol. 1C.
25. Exhibit AP-2012-035-60 at paras. 22-26, Vol. 1D.
26. Exhibit AP-2012-035-61A at para. 4, Vol. 1F.
27. *Ibid.* at paras. 8-9.
28. *Ibid.* at para. 13.
29. *Ibid.* at paras. 17-18.
30. *Ibid.* at para. 22.
31. *Ibid.* at para. 24.
32. Exhibit AP-2012-035-61C at paras. 4-6, Vol. 1F.

34. In the Tribunal's view, the arguments challenged by the CBSA were essentially raised by CTC in its previous submissions. Specifically, CTC argued that the TC-14 model was not comparable to the models sold to CTC (albeit for different reasons) in its request for document disclosure;[33] and it argued, in its supplemental brief, that a portion of the TEC sales included in the profitability analysis had not been made in the ordinary course of trade.[34] In this connection, the alleged facts supporting CTC's argument that sales were outside the ordinary course of trade were also mentioned in its supplemental brief.[35] While CTC's claims that the TC-14 model is only marketed in China and sold under the very high premium Waeco brand do not appear to be directly linked to documents already on the record, the Tribunal decided to accept them into evidence.

35. In the Tribunal's view, any prejudicial effect to the CBSA has been substantially mitigated by the fact that the CBSA had been in possession of CTC's additional supplemental brief for a significant length of time before the hearing and had a meaningful opportunity to address it both in written submissions and at the hearing.

36. Finally, the Tribunal notes that it has accorded these facts and arguments the weight that each deserves in the circumstances.

Onus of Proof

37. CTC alleges a number of errors on the part of the CBSA in its re-determination of the net amount of CTC's AD duty liability in respect of the importation of the goods in issue. In this connection—and consistent with the general principle that the burden of proof lies upon him who affirms and not upon him who denies (*Ei incumbit probatio qui dicit, non qui negat*)—the Tribunal has previously stated that ". . . a person who deems himself aggrieved by a re-determination made pursuant to section 59 of SIMA has the burden of proving that the re-determination is invalid or incorrect."[36] In the normal course, it is not until the appellant has adduced sufficient evidence to call the CBSA's determination into question that the burden shifts to the CBSA to substantiate its determination.[37]

38. While it will generally be the case that the alleging party bears the initial burden of establishing, on a *prima facie* basis, the truth of its specific claims, the Tribunal cannot disregard, through a mechanistic application of a general principle, the over-arching first principles of natural justice and procedural fairness.[38] In this respect, the Tribunal agrees with CTC that the general principle that the appellant bears the burden of proof ". . . is not an absolute rule and the broader principle must be applied with care to particular circumstances, rather than reverting to rote statements."[39] As stated by the Tax Court of Canada in *Mungovan v. The Queen*,[40] albeit in a somewhat different context, "[o]ne should not press the conventional rule about the appellant having the onus so far that one loses sight of its original purpose and of all

33. Exhibit AP-2012-035-24 at para. 36, Vol. 1C; Exhibit AP-2012-035-24A (protected) at para. 36, Vol. 2A.
34. Exhibit AP-2012-035-35 at para. 16, Vol. 1C.
35. Exhibit AP-2012-035-35A (protected) at footnote 5, Vol. 2A.
36. See *Sugi Canada Ltée v. Deputy M.N.R.C.E.* (17 December 1992), AP-92-013 (CITT) at 3. More recently, the Tribunal, in *United Wood Frames Inc. v. President of the Canada Border Services Agency* (7 June 2012), AP-2011-039 (CITT) at para. 10, reiterated that "[t]he onus is on [the appellant] to show that the normal value is invalid or incorrect."
37. *Hickman Motors Ltd. v. Canada*, [1997] 2 SCR 336 (SCC) at para. 94.
38. In this connection, the Tribunal agrees with CTC's assertion that "[q]uestions of onus are grounded in the broader principles of natural justice and fairness." See Exhibit AP-2012-035-60 at para. 23, Vol. 1D.
39. Exhibit AP-2012-035-60 at para. 25, Vol. 1D.
40. 2001 CanLII 732 (TCC).

considerations of procedural fairness."[41] In this regard, situations could conceivably arise (such as where there has been inadequate disclosure by a statutory decision-maker as to the precise findings of fact and rulings of law upon which the decision that gave rise to the controversy was based) in which the initial burden may more appropriately fall on the respondent.

39. However, given that, as a result of a Tribunal disclosure order, CTC has been in possession, since November 1, 2013, of all of the CBSA's documents and spreadsheet calculations that it had requested, the Tribunal sees no justification in the present case for departing from the general principle, which would place the initial onus of proof on CTC to establish, on a *prima facie* basis, the truth of its specific allegations.

40. The Tribunal will next turn to a consideration of each of CTC's specific claims of error by the CBSA.

Purported Further Re-determination of NVs Under Section 59 of *SIMA*

Did CTC Make a Request Under Section 58 of *SIMA* for a Further Re-determination by the President?

41. CTC argued that it was seeking to correct the exchange rate data used in the assessment of AD duties, which the CBSA should have treated as a request to correct a clerical or arithmetic error under subsection 12(2) of *SIMA* rather than a request under section 58 for a re-determination under section 59 of NVs, EPs or whether the goods in issue are of the same description as the goods subject to the Tribunal's finding in *Thermoelectric Containers* (i.e. subjectivity).[42] In this regard, counsel for CTC explained that section 59 re-determinations were limited to the issues addressed in section 56 determinations (i.e. NVs, EPs, the amounts of subsidy and subjectivity), since section 59 re-determinations cannot be something other than a re-determination of a prior determination.[43] He also suggested that, because CTC's request for a correction of the dates used for exchange rate purposes did not fall into any of the issues addressed in a section 56 determination, CTC had not made a valid section 58 request.[44]

42. Section 58 of *SIMA* provides as follows:

58(1) A determination or re-determination by a designated officer under section 55 or 57 with respect to any imported goods is final and conclusive.	58(1) Les décisions ou révisions de l'agent désigné prévues aux articles 55 ou 57 sont définitives en ce qui a trait aux marchandises importées.
(1.1) Notwithstanding subsection (1),	(1.1) Par dérogation au paragraphe (1),
(*a*) where a determination or re-determination referred to in that subsection is made in respect of any goods, including goods of a NAFTA country, the *importer of the goods may, within ninety days after the date of the determination or re-determination, make a written request in the prescribed form and manner and accompanied by the prescribed information to the President for a re-determination, if the importer has paid all duties owing on the goods.*	*l'importateur de marchandises visées par la décision ou la révision peut, après avoir payé les droits exigibles sur celles-ci et dans les quatre-vingt-dix jours suivant la date de la décision ou de la révision, demander au président, par écrit et selon les modalités de forme prescrites par celui-ci et les autres modalités réglementaires — relatives notamment aux renseignements à fournir —, de procéder à un réexamen.*

[Emphasis added]

41. *Ibid.* at para. 13.
42. Exhibit AP-2012-035-60 at paras. 2-8, Vol. 1D.
43. *Transcript of Public Hearing*, 17 July 2014, at 121-22.
44. *Ibid.* at 103-104.

43. As an initial matter, the evidence on the record indicates that CTC did indeed make a request under paragraph 58(1.1)(*a*) of *SIMA* for a further re-determination, by the President, of the CBSA's section 57 re-determination. In particular, by letter dated February 7, 2012,[45] CTC explicitly informed as follows:

> We therefore have exercised our right to appeal these adjustments *under Section 58* of the Special Import Measures Act by requesting a further re-determination of a decision under Section 57.
>
> [Emphasis added]

44. Furthermore, the fact that nowhere in the letter did CTC request the correction of a clerical error was acknowledged in the following exchange between counsel for the CBSA and CTC's customs compliance officer responsible for the goods in issue:

> MR. GIBBS: You are not requesting the correction of a clerical error anywhere in this letter. The words "clerical error" don't appear in this letter.
>
> MS. CERVONI: No.
>
> MR. GIBBS: And there is no reference to section 12(2) of the SIMA.
>
> MS. CERVONI: No, and I was never aware of section 12(2).[46] It also wasn't an option on the DAS.[47]

45. The Tribunal agrees with CTC that, under the statutory scheme of *SIMA*, section 57 re-determinations and, by logical extension, section 58 requests for further re-determinations are limited to re-determining issues determined under subsection 56(1) or (2), namely, NVs, EPs, the subjectivity of the imported goods to an order/finding and the amount of subsidy. However, the Tribunal does not agree with CTC that its request for a correction of dates does not fall within one of these categories. In the Tribunal's

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45. Exhibit AP-2012-035-61A at para. 8, Vol. 1F; Exhibit AP-2012-035-19C (protected), tab 2, Vol. 2A.
46. The Tribunal finds this assertion rather surprising, especially in light of the witness's acknowledged areas of responsibility, as delineated in the following exchange with counsel for the CBSA (see *Transcript of Public Hearing*, 17 July 2014, at 21-24):

> MR. GIBBS: . . . Ms. Cervoni, you mentioned that you were the customs compliance officer for CTC for 18 years.
> MS. CERVONI: Yes.
> MR. GIBBS: *So you would have been responsible for ensuring CTC's compliance with customs legislation*?
> MS. CERVONI: *Yes.*
> MR. GIBBS: *And CBSA's policies and procedures.*
> MS. CERVONI: *Correct.*
> MR. GIBBS: So then *you must be familiar with the Customs Act, the Special Import Measures Act . . . [a]nd Special Import Measures Regulations as well*?
> MS. CERVONI: In relation to the function that I was providing, *yes.*
> . . .
> MR. GIBBS: *You are also familiar with the D-Memos, the departmental memoranda* on that issue?
> MS. CERVONI: *Yes.*
> . . .
> MR. GIBBS: . . . *You regularly communicated with CBSA* on behalf of Canadian Tire?
> MS. CERVONI: In respect of issues that I was responsible for, yes.
> MR. GIBBS: *You would have been responsible for the Special Import Measures Act* for Canadian Tire . . . .
> MS. CERVONI: In respect to certain product lines, *yes*.
> . . .
> MR. GIBBS: *You were aware of the appeal mechanisms under the Special Import Measures Act set out in sections 56 to 59.*
> MS. CERVONI: *Yes.*
>
> [Emphasis added]

47. *Transcript of Public Hearing*, 17 July 2014, at 28-29.

view, the date used to determine the exchange rate is integral to the determination of the NVs applicable to a particular transaction for the purposes of accurately assessing the margin of dumping and the resulting AD duty liability. In particular, the CBSA first calculates NVs in the foreign currency, in this case, Chinese renminbi. Using the PO date or the date of shipment, as appropriate, the CBSA then converts these NVs into Canadian dollars. Only after this conversion has taken place can the resulting NVs be compared to the EPs in order to determine the amount of AD duties actually owed. In this way, the conversion of NVs into Canadian dollars can be described as the last step in the NV determination process for duty enforcement purposes.

46. In the Tribunal's view, the pre-conditions of paragraph 58(1.1)(*a*) of *SIMA* were met for the following reasons: CTC's section 58 request for a further re-determination (which was made on February 7, 2012) fell within 90 days of the CBSA's section 57 re-determination (which was issued on November 17, 2011); CTC had no outstanding AD or CV duty liability on the goods in issue at the time of its section 58 request;[48] and the request was with respect to an issue (i.e. the relevant date of sale for exchange rate purposes) that bears directly upon the calculation of NVs.

47. On the basis of the foregoing analysis, the Tribunal finds that CTC made a valid request under section 58 of *SIMA* for a further re-determination by the President under section 59 of the CBSA's section 57 re-determination.

Should CTC's Request Have Been Treated as a Request to Correct a Clerical or Arithmetic Error Under Subsection 12(2) of *SIMA*?

48. CTC argued that its request for the accurate determination of the duties payable and the return of any excess duties should have been treated as a clerical or arithmetic error requiring correction under subsection 12(2) of *SIMA*.[49] CTC acknowledged that the relevant information concerning the date of sale was not provided at the time of importation through either inadvertence or ignorance on its part.[50] In this respect, CTC argued that *SIMA* distinguishes between a challenge to the NV of an imported product and a request for the return of duties that were overpaid by reason of error, by providing for an alternate mechanism under section 12 for the making of such a claim.[51]

49. The CBSA countered that subsection 12(2) of *SIMA* was not applicable in the circumstances of this case, as the CBSA had not erred in its re-determination of CTC's AD duty liability. Specifically, the CBSA argued that the original detailed adjustment statements did not reflect clerical errors on its part, but rather, the failure on the part of CTC to provide the relevant PO dates before the paragraph 57(*b*) re-determination,[52] with these only having been provided by CTC in the context of its section 58 request:

> . . . **As the Appellant acknowledged in correspondence**, CTC failed to provide the CBSA with relevant purchase order dates prior to the section 57(b) re-determination. Therefore, when making the section 57(b) re-determination, the CBSA appropriately used the date of shipment to determine the rate of exchange. When the importer submitted the purchase order dates, in the context of the section 58 appeal request, the CBSA issued a further re-determination under s. 59, adjusting the duties owing to reflect the prevailing rate of exchange on the purchase order dates and taking into

48. Exhibit AP-2012-035-61A at para. 8, Vol. 1F; Exhibit AP-2012-035-19C (protected), tab 2, Vol. 2A.
49. Exhibit AP-2012-035-60 at para. 3, Vol. 1D.
50. *Ibid*. at para. 6.
51. *Ibid*. at para. 11.
52. Exhibit AP-2012-035-61A at para. 8, Vol. 1F; Exhibit AP-2012-035-19C (protected), tab 2, Vol. 2A.

> account the updated normal values. *The section 57(b) re-determination was nei*ther *a "clerical error" nor an "arithmetic error"; r*ather, *it was a formal re-determination, based on information supplied by* the *importer*.[53]
>
> [Emphasis added, bold and underlining in original, footnote omitted]

50. Subsection 12(2) of *SIMA* provides as follows:

(2) If the President is satisfied that, because of a *clerical or arithmetical error*, an amount has been paid as duty in respect of goods that was not properly payable, the President shall return that amount to the importer or owner of the goods by or on whose behalf it was paid.	(2) Le président rembourse à l'importateur ou au propriétaire de marchandises tout montant, s'il est convaincu que celui-ci a été payé à tort ou en trop, en raison d'une *erreur de transcription ou de calcul*, dans les droits qu'ils ont payés ou qui ont été payés en leur nom sur les marchandises.

[Emphasis added]

51. The federal courts have consistently held that the term "clerical error" refers to an error that arises ". . . in the mechanical process of typewriting or transcribing . . .",[54] with the fact that an error was inadvertent being insufficient to establish it as a clerical error.[55] In this connection, the Federal Court has stated that it is the "clerical origin" of the error that is important.[56] Additionally, the Federal Court and the Federal Court of Appeal have both stated that the character of an error ". . . does not depend at all on its relative obviousness or the relative gravity or triviality of its consequences."[57] These judicial interpretations are consistent with the ordinary dictionary definition of the term "clerical error" as an error "[o]f or pertaining to a clerk or clerks; involving copying out"[58] and with the ordinary meaning of "*erreur de transcription*" (the French equivalent of "clerical error" in *SIMA*) as an error in the "*action de transcrire; son résultat*" (action of copying; the result) or "*copier très exactement, en reportant*" (copy very precisely, by transcribing).[59]

52. The adjective "arithmetic" is defined as ". . . pertaining to, or connected with arithmetic; according to the rules of arithmetic."[60] This suggests that an "arithmetic error" is one relating to a calculative function, (e.g. addition, subtraction, multiplication or division). This view is supported by court decisions that have referred to simple mistakes in addition or multiplication as arithmetic errors.[61]

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53. Exhibit AP-2012-035-61A at para. 9, Vol. 1F.
54. *Bayer AG v. Commissioner of Patents*, [1981] 1 FC 656 [*Bayer*] at para. 7; *Apotex Inc. v. ADIR*, 2009 FCA 222 (CanLII) [*Apotex*] at para. 124. In *Upjohn Co. v. Commissioner of Patents et al.* (1983), 74 C.P.R. (2d) 228 (F.C.T.D.) at 232, the Federal Court alternatively described a "clerical error" as an ". . . [error] caused by a clerk or stenographer."
55. *Dow Chemical Company v. Canada (Attorney General)*, 2007 FC 1236 (CanLII) at para. 27.
56. *Pason Systems Corp. v. Canada (Commissioner of Patents)*, 2006 FC 753 (CanLII) [*Pason Systems*] at para. 34; *Bayer* at 660.
57. *Apotex* at para. 124; *Bayer* at para. 7; *Pason Systems* at para. 34.
58. *Shorter Oxford English Dictionary*, 5th ed., *s.v.* "clerical"; the *Canadian Oxford Dictionary*, 2nd ed., defines "clerical" as "of or done by an office clerk or secretary" and the *Merriam-Webster's Collegiate Dictionary*, 11th ed., defines "clerical" as ". . . of or relating to a clerk . . . ."
59. *Le Nouveau Petit Robert*, *s.v.* "*transcription*" and "*transcrire*".
60. *Shorter Oxford English Dictionary*, *s.v.* "arithmetic". The *Canadian Oxford Dictionary*, 2nd ed., defines "arithmetic" as "concerning arithmetic".
61. See, for example, *D'Or v. St. Germain*, 2013 FC 223 (CanLII), where the Federal Court considered an error in counting election ballots to be an arithmetic error; *this is it design inc. v. The Queen*, 2010 TCC 652 (CanLII) at para. 25 where the Tax Court of Canada considered the improper calculation of inventory values to be an arithmetic error; *Finney v. Callender* (1971), 21 DLR (3d) 640, where the Supreme Court considered an error in calculating the amount of special damages to be an arithmetic error.

53. On the issue of whether recourse to subsection 12(2) of *SIMA* is limited to clerical or arithmetic errors committed by the CBSA or also extends to such errors when committed by importers, these dictionary definitions appear to suggest that clerical and arithmetic errors must be made by the person that produced the document in question. Based on this interpretation, clerical or arithmetic errors can encompass both those made by the CBSA, for example, in its paragraph 57(*b*) re-assessment, and those made by importers, for example, in relation to their self-assessments.

54. This view is supported by such considerations as (i) the fact that the duty liability provisions of sections 3 to 6 of *SIMA* (consistent with Canada's obligations under Article 9.3 of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of* the *General Agreement on Tariffs and Trade, 1994* and Article 19.4 of the WTO *Agreement on Subsidies and Countervailing Measures*[62]) limit the amount of AD or CV duty that can be levied on imported goods to the margin of dumping or amount of subsidy found to exist; (ii) the fact that clerical or arithmetic errors, whether made by the CBSA or importers, can, in the words of subsection 12(2) of *SIMA*, result in ". . . an amount [having] been paid as duty in respect of goods that was not properly payable . . ."; and (iii) the inherent logic of a direct and expeditious option (in lieu of more complex and resource-intensive statutory mechanisms) for the correction of clerical or arithmetic errors, whether committed by the CBSA or importers.

55. In short, it is the Tribunal's view that there is nothing precluding the CBSA from invoking subsection 12(2) of *SIMA* to address an importer's error, provided, of course, such error is of a clerical or arithmetic nature.

56. In the case at hand, any error in the re-assessment of AD duties owing arises not from typewriting, transcription or the calculation process but rather from the fact that CTC had not provided the CBSA with the relevant PO dates prior to the re-determination under paragraph 57(*b*) of *SIMA*, with CTC having only provided the CBSA with this information in the context of its section 58 request.[63]

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62. Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994* (commonly referred to as the *Anti-dumping Agreement*) and Article 19.4 of the *Agreement on Subsidies and Countervailing Measures* (commonly referred to as the *Subsidies Agreement*, respectively provide as follows:

> 9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> 19.4 No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [Footnote omitted]

As stated in R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. at 330, ". . . principles enshrined in international law . . . constitute a part of the legal context in which legislation is enacted and read." In this connection, it is well established at law that legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations under treaties/conventions implemented by Parliament. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324, in which the Supreme Court of Canada stated as follows: "In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here [i.e. *SIMA* was designed to implement Canada's GATT obligations], it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations." *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC) at para. 70; *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1056-57. *SIMA* is specifically intended to implement Canada's rights and obligations in respect of the application of AD and CV duty measures under the WTO agreements and other international trade agreements.

63. Exhibit AP-2012-035-61A at para. 9, Vol. 1F; Exhibit AP-2012-035-60 at para. 8, Vol. 1D.

57. In the absence of this information, the CBSA quite properly used the date of direct shipment to Canada in establishing the applicable exchange rate, as it was specifically permitted to do under the currency conversion provisions of the *Regulations*, which provide as follows:

> 44(1). . . where an amount that is used or taken into account for any purpose in the administration or enforcement of the Act is expressed in the currency of a country other than Canada, the equivalent dollar value of that amount shall be calculated by multiplying that other currency amount by the prevailing rate of exchange . . . in respect of that currency for the *date of sale*.
>
> . . .
>
> 45. *Where sufficient information has not been furnished or is not available* at the time goods have been released from customs possession or entered for warehouse, whichever is the earlier, to enable the calculation under section 44 to be made on the basis of the date of sale, the *date of shipment to Canada* shall be used in place of the date of sale for the purpose of that section.
>
> [Emphasis added]

58. Indeed, that the CBSA was entitled, in the circumstances, to use the date of direct shipment to Canada in establishing the applicable exchange rate was explicitly acknowledged by CTC's customs compliance officer in her testimony.[64]

59. In short, the Tribunal finds no clerical or arithmetic error, within the meaning of those terms in subsection 12(2) of *SIMA*, on the part of the CBSA in its section 57 re-determination.

60. Regarding CTC's assertion that the date of sale was not properly provided at the time of importation ". . . either through inadvertence or ignorance",[65] the Federal Court, as noted earlier, has consistently held that the fact that an error was inadvertent is insufficient to establish it as a clerical error. Accordingly, the Tribunal also finds no clerical or arithmetic error on the part of CTC in relation to the failure to provide the relevant PO dates prior to the paragraph 57(*b*) re-determination.

61. In any event, since CTC made a valid request under paragraph 58(1.1)(*a*) of *SIMA*, it was entirely proper, in the circumstances, for the President to have proceeded under section 59 to conduct a further re-determination of the CBSA's section 57 re-determinations.

> What was the Proper Scope of the President's Section 59 Further Re-determination? Did the President Have the Authority to Re-calculate NVs?

62. CTC submitted that ". . . where the request has been made (as here) under section 58 by the importer, the President is required under section 59 to deal with the basis for the request. . . . To allow the President to use the occasion of the making of the request as a 'carte blanche' to reopen any and all issues (i.e., those not set out as the basis for the request) permits arbitrary, discriminatory, unfair and otherwise unlawful conduct."[66] In short, CTC claimed that it had sought to update a single variable of the original reassessment, which had not been calculated correctly due to the incorrect exchange rate[67] and that the President's use of its request as the basis to initiate a re-determination of NVs was unlawful, as it breached principles of transparency, fairness and natural justice.[68]

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64. *Transcript of Public Hearing*, 17 July 2014, at 28.
65. Exhibit AP-2012-035-60 at para. 6, Vol. 1D.
66. Exhibit AP-2012-035-17B at para. 35, Vol. 1A.
67. Exhibit AP-2012-035-60 at para. 10, Vol. 1D.
68. Exhibit AP-2012-035-17B at para. 30, Vol. 1A.

63. The CBSA countered that section 59 of *SIMA* empowers the President to re-determine any determination or re-determination under section 55, 56 or 57 in respect of any imported goods.[69] In this connection, it claimed that "[t]here is nothing in SIMA that would allow the Appellant to use section 58 to define or restrict the scope of the President's re-determination."[70]

64. Section 59 of *SIMA*, which sets out the circumstances in which the President may make a re-determination or further re-determination, provides as follows:

> 59(1) Subject to subsection (3), the President may re-determine any determination or re-determination referred to in section 55, 56 or 57 or made under this section in respect of any imported goods
>
> (*a*) *in accordance with* a request made pursuant to subsection 58(1.1) or (2);
>
> . . .
>
> (*e*) *in any case where* the *President deems it advisable, within two years after* the *determination referred to in section 55 or subsection 56(1),* as the case may be, *if* the *President has not previously made a re-determination with respect to* the *goods* pursuant to any of paragraphs (*a*) to (*d*) or subsection (2) or (3).
>
> 59(1) Sous réserve du paragraphe (3), le président peut réexaminer les décisions ou les révisions visées aux articles 55, 56 ou 57 ou au présent article, concernant des marchandises importées :
>
> *a*) à la suite d'une demande faite *en application* des paragraphes 58(1.1) ou (2);
>
> [...]
>
> *e*) *de sa propre initiative, dans les deux ans suivant la décision rendue, selon le cas, en vertu de l'article 55 ou du paragraphe 56(1), sauf s'il a déjà fait un réexamen* en vertu des alinéas a) à d) ou des paragraphes (2) ou (3).

[Emphasis added]

65. CTC contended that "[a]llowing the CBSA to re-determine normal values when CTC simply [made] a routine request to correct clerical or arithmetic errors would be contrary to the clear wording of *SIMA* . . . ."[71] In the Tribunal's view, the wording of paragraph 59(1)(*a*) of *SIMA* is not quite so clear. While the deliberate use of the phrase "in accordance with" in paragraph 59(1)(*a*) of the English version, insofar as it connotes "conformity to" or "agreement with",[72] would appear to limit the scope of the President's re-determination to the specific matter raised in the request; the equally authentic French version, which employs the phrase "*à la suite d'une demande*" (following a request), does not appear to be similarly constraining, referring to the timing of the request rather than its substance.

66. In any event, paragraph 59(1)(*a*) of *SIMA* does not exist in isolation, but rather forms part of a broader enumeration of situations in which the President may conduct a re-determination under the authority of subsection 59(1).

67. In this regard, the CBSA argued that the use of the word "and" after paragraph 59(1)(*d*) of *SIMA* is conjunctive and therefore allows the President to rely on multiple paragraphs in a single re-determination.[73] The Tribunal agrees. In the Tribunal's view, nothing in *SIMA* precludes the concurrent recourse by the President to more than one paragraph in subsection 59(1) as long as the pre-conditions in each of those paragraphs are met.

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69. Exhibit AP-2012-035-19A at para. 31, Vol. 1B.
70. *Ibid*. at para. 31.
71. Exhibit AP-2012-035-60 at para. 12, Vol. 1D.
72. *The Concise Oxford Dictionary*, 7th ed. See, also, the *Shorter Oxford English Dictionary*, 5th ed., which defines "accordance" as "[a]greement; conformity; harmony. Esp. in **in accordance with**".
73. Exhibit AP-2012-035-19A at paras. 29, 32, Vol. 1B.

68. In this respect, and as denoted by the phrase "... in any case where the President deems it advisable ...", paragraph 59(1)(*e*) of *SIMA* confers broad discretion upon the President as to the situations in which a re-determination can be made, with there being nothing elsewhere in *SIMA* that would restrict the scope of a re-determination by the President under that paragraph, save, of course, the specific pre-conditions contained in section 59, that is:

- that the re-determination be made within two years after the determination under section 55 or subsection 56(1) was made,[74] or within one year after the request under subsection 58(1.1) or (2) was made in the case of a re-determination under paragraph 57(*b*);[75] and
- that the President has not already made a re-determination under paragraphs 59(1)(*a*) to (*d*) or subsection 59 (2) or (3).[76]

69. In the present case, the evidence indicates that the CBSA issued a re-determination pursuant to paragraph 57(*b*) of *SIMA* on November 17, 2011, and that the President's purported further re-determination under section 59 was issued on June 14, 2012. With the latter being within one year of the former, the Tribunal finds that the section 59 further re-determination fell within the time limit prescribed in subsection 59(3). The Tribunal also notes that there had not been a previous re-determination under section 59 in respect of the goods.[77]

70. That being the case, the Tribunal finds that both pre-conditions in paragraph 59(1)(*e*) of *SIMA* had been met when the President made his further re-determination of NVs.

71. With the pre-conditions of paragraph 59(1)(*e*) of *SIMA* having been met in the circumstances of the case at hand, the Tribunal accepts the CBSA's argument that, under the concurrent authority of paragraphs 59(1)(*a*) and (*e*), the President was entitled to issue a single section 59 re-determination that addressed the issue raised in the importer's section 58 request and that re-determined the duties owed based on the updated NVs emanating from the CBSA's 2011-2012 re-investigation.[78]

72. The Tribunal notes that this view is consistent with a reading of section 59 within the broader context of *SIMA*. Specifically, the duty liability provisions of *SIMA*[79] state that AD and CV duties are to be levied in an amount "equal to" the margin of dumping or amount of subsidy on the goods in issue. Given the existence of updated information pertaining to the NVs of the transactions in question that more accurately reflect the commercial conditions at the time at which the transaction took place, limiting the authority of the President under section 59 to the "a la carte" request of CTC under section 58 would impede the ability of the CBSA to exercise its discretion in accordance with the duty liability provisions of *SIMA* and its statutory mandate to collect AD and CV duties "equal to" the margin of dumping or amount of

74. Paragraph 59(1)(*e*) of *SIMA*.
75. Paragraph 59(3)(*a*) of *SIMA*.
76. Paragraph 59(1)(*e*) of *SIMA*.
77. The CBSA argued and the notice sent to CTC by the CBSA on June 14, 2012, indicated that the President conducted a single re-determination under subsection 59(1) of *SIMA* (see Exhibit AP-2012-035-19A at para. 15, Vol. 1B; Exhibit AP-2012-035-19F, Vol. 1B). In the Tribunal's view, the fact that only a single notice was issued indicates that the paragraph (*a*) re-determination of the applicable exchange rate was not made before the paragraph (*e*) re-determination of NV. Furthermore, the Tribunal notes that CTC did not claim that there had been a previous section 59 re-determination and did not contest a statement to this effect at paragraph 12 in the statement of facts.
78. Exhibit AP-2012-035-19A at para. 33, Vol. 1B.
79. Sections 3-6 of *SIMA*.

subsidy actually benefitting the goods in issue. Indeed, and as pointed out by the CBSA, to suggest otherwise would create an incentive for parties to file immediate and narrow section 58 requests to proactively block the President from performing more thorough reviews of previous re-determinations.[80]

73. On the basis of the foregoing analysis, the Tribunal agrees with the CBSA's contention that importers requesting re-determinations cannot limit the CBSA's statutory authority to issue re-determinations to the wording of their requests[81] and finds that it was proper for the President to have addressed not only the date of sale issue but also certain other aspects of the re-determinations under review, including the accuracy of the NVs applied to the transactions in question, having regard to the updated information pertaining to those transactions.

Did the President's Section 59 Further Re-determination Run Counter to *SIMA*'s Prospective Duty Enforcement System?

74. CTC argued that allowing the CBSA to re-determine NVs when CTC made a routine request to correct clerical or arithmetic errors would be contrary to the clear wording of *SIMA* and would go against the CBSA's longstanding method of administering and enforcing duties on a prospective basis.[82]

75. Unlike retrospective duty assessment systems where importers must post security upon the importation of subject goods and where final AD duty liability is established at some later date based upon an administrative review of each individual importation that occurred during the immediately preceding period of review, under Canada's prospective duty enforcement system, specific NVs are established in advance of importation, with subject goods priced at or above their specific NVs not incurring any AD duty liability on importation into Canada.

76. That being said, Canada's prospective duty enforcement system does include certain retrospective elements. In particular, sections 55 to 59 of *SIMA* constitute a scheme of sequential, administrative mechanisms that allow for the determination, re-determination and further re-determination of issues, such as NV, EP, amount of subsidy and the subjectivity of goods to AD and CV duties. This ensures that AD and CV duties levied on goods are equal to the actual margin of dumping or amount of subsidy, with section 61 providing recourse to the Tribunal from the re-determinations of the President under section 59.

77. In this connection, the Tribunal in *XYZ Dynamo Ltd. v. Deputy M.N.R.C.E.*[83] found that paragraphs 56(1)(*b*) and 57(1)(*b*) (now 57(*b*)) and subsection 56(2) of *SIMA* clearly permitted officials of the Department of National Revenue to re-determine NVs and thus to re-assess whether AD duties are payable within two years of the importation of the goods. In the Tribunal's view, this same reasoning can be applied to section 59; section 59 provides similar powers of re-determination to those set out in paragraphs 56(1)(*b*) and 57(*b*) and subsection 56(2), and it likewise sets out time periods in which the President may make a re-determination.[84]

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80. Exhibit AP-2012-035-19A at para. 30, Vol. 1B.
81. Exhibit AP-2012-035-61A at para. 8, Vol. 1F.
82. Exhibit No. AP-2012-035-60 (protected) at para. 12, Vol. 10.
83. (26 February 1991), 3013 (CITT).
84. See, in particular, paragraph 59(1)(*e*) of *SIMA*, which indicates that the President may make a re-determination "... within two years after the determination referred to in section 55 or subsection 56(1)", and paragraph 59(3)(*a*), pursuant to which the President may make a re-determination "... within one year after the request under subsection 58(1.1) or (2) was made".

78. Moreover, and contrary to CTC's assertion that the re-determination of NVs went against the CBSA's longstanding prospective method of enforcing/administering duties, the re-determination of NVs in this case was consistent with the CBSA's established practice, as reflected in Memorandum D14-1-7,[85] which provides as follows:

> 8. . . . As a result of the re-investigation, the revised normal values, export prices, or amounts of subsidy will apply to all importations of goods released on or after the date the new figures are announced, or 90 days from the date of the initiation of the re-investigation, whichever occurs first.
>
> 9. Normally, such new values will not be applied retroactively. However, there are two important exceptions. First, the new values will be applied retroactively in cases where the parties have not advised the Anti-dumping and Countervailing Directorate of the CBSA in a timely manner of substantial changes which affect normal values, export prices, or amounts of subsidy. Second, *where* the*re is a request for a re-determination*, the *re-determination will be based on the amounts calculated using information from* the *same time period as* the *date of sale to Canada of* the *imported goods*, or the most recent information prior to that period. *This may result in an additional duty assessment or a refund depending on* the *specific situation*.
>
> [Emphasis added]

79. The Tribunal notes, in this regard, that, consistent with its stated duty assessment methodology, the President applied updated sales and cost data from the 2011-2012 re-investigation pertaining to the October 1, 2010, to September 30, 2011 period of investigation, in the further re-determination of NVs applicable to the goods in issue with PO dates during that period.

80. For the foregoing reasons, the Tribunal rejects CTC's claim that the CBSA's re-determination of NVs was contrary to the clear wording of *SIMA* and its longstanding method of administering and enforcing duties.

81. Having found:

- that CTC made a request under section 58 of *SIMA* for a further re-determination by the President;
- that the President, in conducting the further re-determination under section 59 of *SIMA*, was not confined to the issues raised in CTC's section 58 request but, rather, was also entitled to consider other relevant aspects of the assessments under review, bearing upon actual AD duty liability, including the accuracy of NVs applied to the transactions in question; and
- that the President's section 59 further re-determination was not unreasonable but, rather, was consistent with the statutory scheme of *SIMA* and the CBSA's established method of administering/enforcing duties thereunder;

the Tribunal will next turn its attention to CTC's specific claims of error in respect of the NVs, as further re-determined by the President.[86]

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85. (16 May 2013), "Assessment of Anti-dumping and Countervailing Duties Under the *Special Import Measures Act*".

86. As per the Tribunal's directions of March 4, 2014, CTC's specific claims of error are those set out in its additional supplemental brief of April 15, 2014 (see Exhibit AP-2012-035-60, Vol. 1D).

NVs as Further Re-determined by the President

82. Pursuant to section 15 of *SIMA*, the NV of goods exported to Canada is the price of like goods sold by the exporter in its home market. Where NV cannot be determined under section 15 by reason of the fact that there was not, in the President's opinion, such a number of sales of like goods as to permit a proper comparison with the sale of the goods in issue to the importer, paragraph 19(*b*) allows NV to be constructed on the basis of the aggregate of the cost of production of the goods imported into Canada, a reasonable amount for administrative, selling and all other costs, and a reasonable amount for profits.

83. Paragraph 19(*b*) of *SIMA* provides as follows:

> 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 option of the President in any case or class of cases, as
>
> . . .
>
> (*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.

> 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 montants suivants, sous réserve de l'article 20 :
>
> [...]
>
> *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.

84. In the present case, the evidence indicates that NVs for the goods in issue were determined under either section 15 or paragraph 19(*b*) of *SIMA*, the President having formed the opinion, on the basis of an analysis of Mobicool's domestic sales database, that there were sufficient sales in the exporter's home market (i.e. China) that were comparable to sales to the importer in Canada, for only a few of the goods in issue. For those models in respect of which it was considered that there were sufficient comparable home market sales, NVs were established pursuant to section 15; for the remaining models of the goods in issue, NVs were determined pursuant to paragraph 19(*b*).[87]

85. CTC claimed that the CBSA erred on several fronts in its construction of NVs under paragraph 19(*b*) of *SIMA*. In particular, CTC contended that the CBSA failed to correctly calculate a reasonable amount for profit by (i) including sales made by the exporter in its home market (i.e. China) that were outside the ordinary course of trade, (2) restricting itself to sales data for discrete 60-day periods[88] and (3) including home market sales by the exporter of the TC-14 model, a model which was not comparable to the models sold by the exporter to CTC.[89] In addition, CTC argued that the results of the calculations, in which the amount of profit in one period is significantly higher than the amounts in all other periods, confirm the unreasonableness of the methodology used by the CBSA.[90]

87. Exhibit AP-2012-035-19A at paras. 50-51, Vol. 1B.
88. Exhibit AP-2012-035-60 at para. 16, Vol. 1D.
89. Exhibit AP-2012-035-60C at para. 17, Vol. 1D.
90. *Ibid*. at para. 18; Exhibit AP-2012-035-35 at paras. 10-14, Vol. 1C.

Were Certain Home Market Sales Included in the Calculation of NVs Made Outside the Ordinary Course of Trade?

86. Paragraph 13(*a*) of the *Regulations* provides that, for the purposes of paragraph 11(1)(*b*) of the *Regulations*, "sales that are such as to permit a proper comparison are sales . . . that satisfy the greatest number of conditions set out in paragraphs 15(*a*) to (*e*) of the Act . . . ." Among these conditions is the requirement in paragraph 15(*c*) of *SIMA* that the exporter's home market sales be "in the ordinary course of trade".

87. CTC claimed that the amount for profit was unreasonable, as the level of profitability had been distorted by the inclusion of the extraordinary sale of a particular TEC model that was not made in the ordinary course of trade due to the purchaser's reason for making the sale.[91]

88. In *Archer's Signs & Trophies v. M.N.R.*,[92] the Tribunal determined that, for a transaction to be "in the ordinary course" of trade, it ". . . must fall into place as part of the undistinguished common flow of business done; that it should form part of the ordinary business as carried on, calling for no remark and arising out of no special or particular situation."[93]

89. This finding is supported by the definition of the phrase "in the ordinary course of trade" in SIMA Handbook, which provides as follows:

> . . . in general, that goods are offered for sale to an individual customer on the same terms as they would be offered for sale to any other customer buying the same quantity, at the same trade level, with the same freight conditions, and so forth. In other words, the sales are according to common business practices and customs of the commercial world or that particular commercial sector.[94]

90. In the Tribunal's view, the issue of whether a sale was made "in ordinary course of trade" is to be determined objectively, by reference to the general commercial practices of the industry. Indeed, the considerations for determining whether a sale is made in the ordinary course of trade that emerge from jurisprudence focus on the commercial specifics of the transaction itself (e.g. its terms, conditions, parties, price and quantity sold)[95] rather than on the subjective motivations of the purchaser for entering into the transaction. In this regard, the Tribunal agrees with the CBSA's submission that the rationale behind a particular customer's purchase is irrelevant to the issue of whether the purchase itself was made in the ordinary course of trade.[96]

91. The Tribunal considers that the challenged transaction by the exporter in its home market was not extraordinary but, rather, was made in the ordinary course of trade. This is supported by uncontested evidence indicating that (i) sales of this model accounted for a significant share (in terms of both volume and value) of the exporter's home market sales of TECs during the 60-day period in question[97] and (ii) the transaction challenged by CTC was not aberrational in terms of its profitability from other sales of the same model during the entire period of investigation or from sales of other TEC models during the entire period

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91. Exhibit AP-2012-035-60 at para. 17, Vol. 1D.
92. (1 February 1993), AP-91-261 (CITT) [*Archer's Signs*].
93. *Archer's Signs* at 4, citing *Downs Distributing Co. Pty., Ltd. v. Associated Blue Star Stores Pty., Ltd. (In Liquidation)* (1948), 76 C.L. R. 463 at 477.
94. SIMA Handbook at 309.
95. See, for example, *Fairline Boats Ltd. v. Leger* 1980 CarswellOnt 607 (On.C.A.).
96. Exhibit AP-2012-035-61 at paras. 22-23, Vol. 1F.
97. Exhibit AP-2012-035-36B (protected) at para. 16, Annex 2, Vol. 2B.

of investigation, as there were sales of other TEC models that also yielded significant profits throughout that period.[98] Furthermore, CTC has not challenged any of the commercial aspects of the transaction in support of its claim that it was made outside the ordinary course of trade.

92. For these reasons, the Tribunal finds that the exporter's home market sales of the TEC model in question were made in the ordinary course of trade.

Was it Proper for the President to Calculate NVs on the Basis of Discrete 60-day Periods?

93. In the 2011-2012 re-determination, the CBSA divided the period of investigation into six 60-day periods. It calculated a separate NV for each of these 60-day periods and then applied the NV applicable to each 60-day period to the importations that took place during that period.[99]

94. CTC argued that the CBSA erred in its calculation of a reasonable amount for profit by restricting itself to data for a discrete 60-day period, although it provided little in the way of support for this argument.

95. Paragraph 19(*b*) of *SIMA* and paragraph 11(1)(*b*) of the *Regulations* are silent with respect to the time periods during which sales permitting a proper comparison must fall. However, paragraph 13(*a*) of the *Regulations*, which provides additional guidance on the interpretation of paragraph 11(1)(*b*) of the *Regulations*, states that sales permitting a proper comparison are those that ". . . satisfy the greatest number of conditions set out in paragraphs 15(a) to (e) of the Act . . . ."

96. In this connection, the condition set out in paragraph 15(*d*) of *SIMA* (which requires the CBSA to look at sales during a 60-day period that ". . . ends in the interval commencing with the first day of the year preceding the date of sale of the goods to the importer and ending on the fifty-ninth day after such date as is selected by the President . . .") confers upon the President the discretion to choose a 60-day period within the broader period that starts one year before the date of sale and ends 59 days after the sale.

97. Being compatible with paragraph 15(*d*) of *SIMA*, it was not unreasonable, in the Tribunal's view, for the CBSA to have calculated NVs on the basis of discrete 60-day time periods.

Did Consideration of the TC-14 Model Result in an Improper Comparison?

98. CTC asserted that the CBSA erred in resorting to subparagraph 11(1)(*b*)(ii) of the *Regulations* without first having exhausted the requirement of subparagraph 11(1)(*b*)(i), which directs it to look at the profitability of sales of "like goods" in the country of export.[100] Specifically, CTC contended that the CBSA erred in not applying subparagraph 11(1)(*b*)(i) because there were domestic sales of "like goods" in the Chinese market.[101]

99. In addition, CTC asserted that the CBSA had incorrectly included sales of the TC-14 model within sales of goods of the same general category under subparagraph 11(1)(*b*)(ii) of the *Regulations*. In CTC's view, this model was not comparable to the TEC models sold to CTC, as it was only marketed in China and sold under the premium Waeco brand.[102]

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98. Exhibit AP-2012-035-36A at paras. 17-19, Vol. 1C; Exhibit AP-2012-035-36B (protected), Annex 2, Vol. 2B; Exhibit AP-2012-035-61A at para. 23, Vol. 1F.
99. Exhibit AP-2012-035-19A at para. 46, Vol. 1B; Exhibit AP-2012-035-19D, tab 14, Vol. 1B.
100. *Transcript of Public Hearing*, 17 July 2014, at 113, 129.
101. *Ibid*. at 129.
102. Exhibit AP-2012-035-60C at para. 17, Vol. 1D.

100. Where recourse is had to section 19 of *SIMA*, paragraph 11(1)(*b*) of the *Regulations* prescribes a cascading set of methodologies for the calculation of "a reasonable amount for profits", with the availability of each successive methodology being contingent upon the inapplicability of the immediately preceding method.

101. In this regard, where subparagraph 11(1)(*b*)(i) of the *Regulations* is rendered inapplicable by reason of the fact that sales of "like goods" by the exporter in its home market were insufficient to produce a proper comparison, subparagraph 11(1)(*b*)(ii) allows the calculation of "a reasonable amount for profits" to be based on home market sales of goods "of the same general category" as the goods sold to the importer in Canada:

> 11(1) For the purposes of paragraph 19(*b*) and subparagraph 20(1)(*c*)(ii) of the Act,
>
> . . .
>
> (*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 weighted average profit made on the sales,
>
> . . .
>
> [Emphasis added]

102. The CBSA explained, and the Tribunal accepts, that the CBSA moved from subparagraph 11(1)(*b*)(i) of the *Regulations* to subparagraph 11(1)(*b*)(ii) in establishing "a reasonable amount for profits" because there were insufficient sales of like goods to permit a proper comparison with the sales of the goods to CTC.[103]

103. In addition, the CBSA determined that, while the TC-14 model was not a "like good"[104] for purposes of subparagraph 11(1)(*b*)(i) of the *Regulations*, it was a good ". . . of the same general category as the goods sold to the importer in Canada . . ." within the meaning of subparagraph 11(1)(*b*)(ii), and the CBSA calculated "a reasonable amount for profits" accordingly.[105] In this connection, that the TC-14 model fell within the general category of TECs was acknowledged by the witness for CTC.[106]

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103. Exhibit AP-2012-035-27A (protected), Exhibit 14; *Transcript of In Camera Hearing*, 17 July 2014, at 7-15, 42-43; *Transcript of Public Hearing*, 17 July 2014, at 157-58.
104. Subsection 2(1) of *SIMA* defines "like goods" as follows:

> "like goods", in relation to any other goods, means
> (*a*) goods that are identical in all respects to the other goods, or
> (*b*) in the absence of any goods described in paragraph (*a*), goods the uses and other characteristics of which closely resemble those of the other goods;

105. Exhibit AP-2012-035-36D at para. 13, Vol. 1C.
106. *Transcript of Public Hearing*, 17 July 2014, at 77, 79.

104. The Tribunal is of the view, on the basis of its review of the evidence on the record, that the inclusion of the disputed TC-14 model within the general category considered by the CBSA in its application of subparagraph 11(1)(*b*)(ii) of the *Regulations* was entirely reasonable. In arriving at this view, the Tribunal notes that the TC-14 model falls within the definition of "subject goods" in *Thermoelectric Containers*, which contained no restrictions with respect to size or end use[107] (a point uncontested by the parties and accepted by the Tribunal). In addition, the Tribunal notes product literature regarding the TC-14 and TC35 models and the testimony of the witness for CTC confirming:

- that the TC-14 model was of the same family as the TC-35 model, which is imported into Canada by CTC:

> MR. GIBBS: *You identify TC35 as one of those thermoelectric coolers that is sold in Canada, imported by Canadian Tire, correct?*
>
> MR. DUMRATH: *That's correct*.
>
> MR. GIBBS: *The TC35 is* the *same family as* the *TC14.*
>
> MR. DUMRATH: *That's correct*.
>
> . . .
>
> MR. GIBBS: The TC35 and the TC14 are in the same family.
>
> MR. DUMRATH: That's correct.
>
> MR. GIBBS: And the TC35 is sold in Canada.
>
> MR. DUMRATH: That's correct.[108]
>
> [Emphasis added]

- that the TC-14 model and the TC-35 model have similar potential applications, including the heating and cooling of foodstuffs:

> MR. GIBBS: Can you take the instruction manual, please, and have a look at it? . . .
>
> . . .
>
> MR. GIBBS: *So it's* the *same instruction manual for TC14 and TC35*.
>
> MR. DUMRATH: *That's correct*.
>
> MR. GIBBS: Can you turn to section 4 of the instruction manual, please, and read that out for us?
>
> MR. DUMRATH: "*The refrigerator can be used to cool and keep foodstuffs warm.* The device can also be used for camping purposes. If you want to cool medicine, check please if the cooling capacity of the device corresponds to the requirements of the respective pharmaceuticals. *All materials processed in* the *refrigerator are safe for foodstuffs*."[109]
>
> [Emphasis added]

and

- that the TC-14 model and the TC-35 model have essentially the same performance and mechanical design specifications:

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107. Exhibit AP-2012-035-36A at paras. 14-15, Vol. 1C.
108. *Transcript of Public Hearing*, 17 July 2014, at 61, 64.
109. *Ibid.* at 73-74.

> PRESIDING MEMBER: *Comparing* the *[TC]35 model and* the *[TC]14 model*, the [TC]35 *model* which is sold in Canada and the [TC]14 which isn't, would it be correct to say in terms of their performance specifications just looking at that aspect, *do* they *essentially have* the *same performance specifications and* the *same mechanical design to achieve those specifications*?
>
> MR. DUMRATH: Yes.
>
> PRESIDING MEMBER: They do.
>
> MR. DUMRATH: Yes.[110]
>
> [Emphasis added]

105. In short, considering that the TC-14 model and the TC-35 model (which is sold in Canada) are acknowledged to be in the same family of TECs, with similar potential applications, performance specifications and mechanical design, the Tribunal finds that it was entirely reasonable that the TC-14 model be included in the general category of goods considered by the CBSA in its application of subparagraph 11(1)(*b*)(ii) of the *Regulations* for the purpose of establishing "a reasonable amount for profits" in the construction of NVs under paragraph 19(*b*) of *SIMA*.

106. In the Tribunal's view, however, the fact that goods are of "the same general category as the goods sold to the importer in Canada" does not, *a fortiori*, imply that they are such as to permit "a proper comparison",[111] these being separate and distinct criteria under subparagraph 11(1)(*b*)(ii) of the *Regulations*.

107. The Tribunal has previously found that the purpose of the phrase "proper comparison" is to ensure that the CBSA, when determining NVs, uses sales of like goods (or goods in the same general category) in the domestic market of the exporting country that closely correspond to the sales of goods made for export to Canada and to ensure that adjustments are made to the sale price of the goods sold in the domestic market of the exporting country to fairly reflect any differences between these sales and those made for export to Canada.[112]

108. Paragraph 11(*b*) of the *Regulations* is subject to section 13 of the *Regulations*. Paragraph 13(*a*) of the *Regulations* provides that the sales that ". . . permit a proper comparison are [those] . . . that satisfy the greatest number of conditions set out in paragraphs 15(*a*) to (*e*) of [*SIMA*] . . . ." Paragraphs 15(*a*) to (*e*) of *SIMA* set out the requirements that sales must be (a) to purchasers not associated with the exporter and that 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 in competitive conditions, (d) within certain time periods of the date of sale of the goods to the importer and (e) at the same place from which the goods were or would have been shipped directly to Canada under normal conditions of trade.

109. In this case, the Tribunal is satisfied that the CBSA acted reasonably when it included sales of the TC-14 model for the purposes of calculating a reasonable amount for profit, with the inclusion of these sales not resulting in an improper comparison. As indicated above, the Tribunal considers that all sales considered

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110. *Ibid*. at 80.
111. In this regard, CTC stated that "*[the] TC-14 [model] is not a like good to the goods that have been imported into Canada*." *Transcript of Public Hearing*, 17 July 2014, at 134. This point was not contested by the CBSA and is accepted by the Tribunal.
112. *Fletcher Leisure Group Inc. v. Deputy M.N.R.* (26 September 1997), AP-96-199 (CITT).

by the CBSA, including the transaction impugned by CTC, were made in the ordinary course of trade[113] and fell within a 60-day time period that meets the requirements of paragraph 15(*d*) of *SIMA*. Moreover, there is evidence on the record indicating that the purchasers were not associated with the exporter.[114] Thus, a sufficient number of the conditions set out in paragraphs 15(*a*) to (*e*) have been met.

110. Finally, the Tribunal does not accept CTC's unsubstantiated claim (which is contradicted by evidence on the record)[115] that the TC-14 model is only marketed in China. More importantly, however, there is no requirement in paragraph 11(1)(*b*) and paragraph 13(*a*) of the *Regulations* or paragraphs 15(*a*) to (*e*) of *SIMA* that the like goods be sold in countries other than the country of export. Indeed, the primary method of determining an NV (under section 15 of *SIMA*) is to determine the price at which the exporter sells like goods in the domestic market in that exporter's country. That the exporter also sells like goods in countries other than the exporter's own country is therefore irrelevant.

111. On the basis of the evidence on the record, the Tribunal finds no error in either CBSA's decision to apply subparagraph 11(1)(*b*)(ii) of the *Regulations* or the manner of its application of same.

Do the Results of the CBSA's NV Calculations Confirm the Unreasonableness of the Methodology Used?

112. CTC argued that the fact that amounts for profit varied significantly between 60-day periods provided additional evidence that the CBSA had incorrectly calculated them. The Tribunal rejects this argument. For the reasons indicated above, the Tribunal found that the CBSA reasonably calculated amounts for profit and, thus, NVs in accordance with the relevant provisions of *SIMA* and the *Regulations*. That being the case, the appearance of NVs being greater than normal does not provide a sufficient basis for their rejection.

FINAL REMARKS

113. While the President's consideration of CTC's letter dated February 7, 2012, as a request under section 58 of *SIMA* for a further re-determination under section 59 was reasonable, and while the manner in which the President arrived at the section 59 decision was in accordance with law, the Tribunal is not unsympathetic to CTC's situation, insofar as its request that the date of sale for the transactions in question be changed from the date of shipment to the PO date in accordance with its internal accounting policy[116] resulted in the unexpected incurrence of new and significant AD duty liability. Of particular concern is the hardship that a similar situation could visit upon small importing enterprises which might not have the capacity to absorb a significant amount of additional and unforeseen duty liability.

114. Finally, while subsection 12(2) of *SIMA* was not available in the particular circumstances of the present case for the reasons set out earlier, the Tribunal is concerned about the CBSA's apparent failure to have operationalized subsection 12(2) for the correction of clerical and arithmetic errors.[117] The failure to do

113. See Report of the Appellate Body, *European Communities – Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (22 July 2003), WT/DS219/AB/R at para. 97 where the Appellate Body observed that Article 2.2.2 of the *Anti-dumping Agreement* imposes a general obligation on an investigating authority to first attempt to use actual data pertaining to production and sales in the ordinary course of trade when determining amounts for administrative, selling and general costs and profits in the construction of NVs.
114. Exhibit AP-2012-035-27A (protected), Profitability Analysis (For CTC Appeal), tab "Includes".
115. Exhibit AP-2012-035-61A at para. 19, tab 1, Vol. 1F.
116. *Transcript of Public Hearing*, 17 July 2014, at 19-21.
117. *Ibid.* at 105.

so has effectively deprived that provision of purpose, with the result being automatic default to the typically more complex and resource-intensive re-determination provisions of *SIMA* in such instances.

DECISION

115. For the reasons identified above, the Tribunal finds that the President properly considered CTC's request as having been made under section 58 of *SIMA*, was entitled to consider the updated NVs emanating from the 2011-2012 re-investigation in conducting the further re-determination under section 59 of *SIMA* and acted reasonably in its construction of NVs under paragraph 19(*b*) of *SIMA*.

116. Accordingly, the appeal is dismissed.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Daniel Petit
Daniel Petit
Member

Ann Penner
Ann Penner
Member