Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. EA-2019-001

Ferrostaal Metals GmbH

v.

President of the Canada Border Services Agency

Decision issued
Thursday, July 2, 2020

Reasons issued
Monday, August 17, 2020

Canada

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IN THE MATTER OF an appeal heard on March 3, 2020, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated May 17, 2019, with respect to a request for re-determination pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

FERROSTAAL METALS GMBH **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette

Serge Fréchette
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 3, 2020
Tribunal Panel:	Serge Fréchette, Presiding Member
Support Staff:	Alain Xatruch, Counsel Kalyn Eadie, Counsel

PARTICIPANTS:

Appellant	**Counsel/Representatives**
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Respondent	**Counsel/Representatives**
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Interveners	**Counsel/Representatives**
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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal by Ferrostaal Metals GmbH (Ferrostaal) filed on August 12, 2019, pursuant to subsection 61(1) of the *Special Import Measures Act*,[1] from a re-determination of the President of the Canada Border Services Agency (CBSA) made on May 17, 2019, pursuant to section 59 of *SIMA*, with respect to the importation of certain concrete reinforcing bar (rebar) from Belarus by Ferrostaal (the imported goods).

[2] The issue in this appeal is whether the normal values (NVs) applicable to the imported goods should be those established during the CBSA's re-investigation, which concluded on May 4, 2018, as determined by the President of the CBSA, or those established during the CBSA's original investigation, which concluded on April 3, 2017, as claimed by Ferrostaal.

PROCEDURAL HISTORY

[3] On April 3, 2017, the President of the CBSA made a final determination of dumping with respect to certain rebar originating in or exported from Belarus, Chinese Taipei, Hong Kong, Japan, Portugal and Spain (the subject goods). During the investigation underlying this determination, the CBSA found that Open Joint-Stock Company Byelorussian Steel Works (BMZ) was a producer and exporter of the subject goods located in Belarus and that, during the period of investigation (the period from June 1, 2015, to May 31, 2016), all of its export sales to Canada were made through a related company, Bel-Kap Steel LLC (Bel-Kap).[2] Bel-Kap is a joint venture owned by BMZ and Pisec Group GmbH (Pisec).[3] The CBSA also established NVs for all cooperating exporters, which included BMZ.[4]

[4] On May 3, 2017, the Tribunal issued its finding that the dumping of the subject goods had caused injury to the domestic industry (i.e. the domestic producers of rebar of the same description as the subject goods).[5] Accordingly, anti-dumping (AD) duties were imposed on all subject goods imported into Canada at prices below the NVs established by the CBSA during its investigation.[6] Imports of subject goods from exporters that had failed to cooperate with the CBSA in its investigation were assessed an anti-dumping duty of 108.5% of the export price.[7]

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1 R.S.C., 1985, c. S-15 [*SIMA*].

2 See para. 96 of the CBSA's statement of reasons for its final determination of dumping, which is available at https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/rb22016/rb22016-fd-eng.html.

3 Exhibit EA-2019-001-04 at para. 10, Vol. 1.

4 NVs for BMZ were determined pursuant to subparagraph 20(1)(c)(i) of *SIMA* (see paragraph 98 of the CBSA's statement of reasons for its final determination of dumping).

5 *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT).

6 Section 3 of *SIMA* provides that anti-dumping duties are to be levied in an amount equal to the "margin of dumping", which is defined under subsection 2(1) as the amount by which the NV of the goods exceeds the export price of the goods. As will be discussed further below, under Canada's prospective duty enforcement system, liability for anti-dumping duties may be eliminated by increasing the selling price of the goods (i.e. the export price of the goods) to a level that is at or above the NVs previously established by the CBSA.

7 The CBSA established NVs for all non-cooperating exporters, but these were determined under a ministerial specification, pursuant to subsection 29(1) of *SIMA*, based on the export price of the goods plus an amount equal to 108.5% of that export price (see paragraphs 149 and 151 of the CBSA's statement of reasons for its final determination of dumping). In this case, liability for anti-dumping duties may not be eliminated by increasing the selling price of the goods.

[5] On December 4, 2017, the CBSA initiated a re-investigation to update the NVs and export prices of the subject goods as part of its ongoing enforcement of the Tribunal's injury finding issued on May 3, 2017. The period covered by the re-investigation was from May 1, 2016, to October 31, 2017.

[6] On May 4, 2018, the CBSA concluded its re-investigation and issued revised NVs to all exporters that had cooperated with the CBSA, including BMZ. The notice of conclusion of re-investigation (the Notice) issued by the CBSA contained the following statement (the Statement):

> The normal values . . . will be effective for subject goods released from the CBSA on or after May 4, 2018, and will remain effective until such a date that the CBSA updates the normal values . . . or the CITT rescinds [its] finding. All normal values . . . previously in place expire on this date. In addition, the normal values . . .determined on the basis of the current re-investigation will be applied to any entries of subject goods under appeal that have yet to be re-determined at the time of the conclusion of this re-investigation.[8]

[7] Ferrostaal, which is an importer and distributor of certain steel products in Canada, had entered into a sales contract with Pisec for the imported goods on November 17, 2017. The customs documentation prepared by Ferrostaal's customs broker indicated that the goods were produced in Belarus, exported from another country, shipped to Canada from Klaipeda, Lithuania, on April 8, 2018, and released from customs on April 25, 2018.[9]

[8] The customs documentation also identified Pisec as the vendor of the imported goods and did not indicate that the goods were subject to the Tribunal's finding (i.e. no SIMA code was entered), which is required even if there is no amount of anti-dumping duty owing. No anti-dumping duties were paid on the imported goods and, through the operation of subsection 56(2) of *SIMA*, a determination as to whether the goods were subject to the Tribunal's finding, and of their NV and export price, was deemed to have been made on the 30th day after the goods were accounted for, and in accordance with the information provided by Ferrostaal's customs broker.

[9] The transaction involving the imported goods was reviewed by the CBSA as part of its regular enforcement activities. As the imported goods were subject to the Tribunal's finding and Pisec was not an exporter for whom NVs had been established by the CBSA, the NVs for the imported goods were re-determined under the ministerial specification as an advance of 108.5% over the export price of the goods and a corresponding assessment of AD duties was issued to Ferrostaal pursuant to paragraph 57(b) of *SIMA* on September 10, 2018.[10]

[10] Ferrostaal subsequently contacted the CBSA in an attempt to have the re-determination made under paragraph 57(b) of *SIMA* cancelled. It claimed that its customs broker had misidentified the exporter and the country of export because of an error on the certificate of origin, which indicated that Pisec was the shipper when it should have indicated that it was "BMZ on behalf of Pisec".[11] Ferrostaal also filed two adjustment requests with the CBSA, along with revised certificates of

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8 Exhibit EA-2019-001-04 at para. 27, Vol. 1. The letter issued by the CBSA to BMZ at the conclusion of the re-investigation contained a similar statement. See Exhibit EA-2019-001-17A (protected), Vol. 2 at 23.

9 Exhibit EA-2019-001-17A (protected), Vol. 2 at 29-32.

10 Exhibit EA-2019-001-04C (protected) at Tab D, Vol. 2.

11 Exhibit EA-2019-001-04 at paras. 16, 19, Vol. 1.

origin, in order to change the exporter and the country of export on the original accounting documents to BMZ and Belarus, respectively.[12]

[11] The CBSA informed Ferrostaal that it would not cancel its assessment of AD duties issued pursuant to paragraph 57(b) of *SIMA* and that Ferrostaal's adjustment requests could not be processed until those duties had been paid and all required supporting documentation was received.[13] It ultimately encouraged Ferrostaal to exercise its appeal rights under subsection 58(1.1) of *SIMA* by filing a (new) request for re-determination.[14]

[12] On November 30, 2018, Ferrostaal filed a request for re-determination pursuant to subsection 58(1.1) of *SIMA* on the basis that the imported goods were exported by BMZ (an exporter with established NVs) and that the AD duties were therefore not owing on the goods.[15] Ferrostaal included as part of its request proof that it had paid all AD duties owing on the imported goods, as is required by paragraph 58(1.1)(a).

[13] On May 17, 2019, the President of the CBSA determined, pursuant to section 59 of *SIMA*, that BMZ was the exporter for *SIMA* purposes, that the NVs established for BMZ by the CBSA during the re-investigation that concluded on May 4, 2018, were applicable to the imported goods, and that the exporter's sale prices less export charges were the export prices for the imported goods.[16] As these NVs were higher than those established during the CBSA's original investigation, and as the export prices were lower than the selling prices originally declared, AD duties remained owing and Ferrostaal was thus only granted a partial refund of the duties that it had paid.

[14] Following the issuance of the President's section 59 re-determination, counsel for Ferrostaal were verbally advised by a CBSA officer that the NVs established during the re-investigation that concluded on May 4, 2018, were applied to the imported goods on the basis of the Statement made in the Notice.[17]

[15] On August 12, 2019, Ferrostaal filed a notice of appeal with the Tribunal pursuant to subsection 61(1) of *SIMA*. Ferrostaal is essentially seeking a finding that the NVs established for BMZ during the CBSA's original investigation (i.e. the NVs existing at the time the imported goods were released from customs) are applicable to the imported goods and an order directing the President of the CBSA to refund the AD duties that remained owing following the section 59 re-determination.

[16] On November 14 and 15, 2019, ArcelorMittal Long Products Canada G.P. (AMLPC) and Gerdau Ameristeel Corporation (Gerdau) respectively sought leave to be added as interveners in this proceeding. AMLPC and Gerdau are both domestic producers of rebar that benefit from the protection offered by the Tribunal's injury finding with respect to the subject goods.

[17] On November 21, 2019, Ferrostaal requested that the Tribunal not grant either party intervener status because neither had shown how their intervention would be necessary to assist in

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12 Exhibit EA-2019-001-04C (protected), Vol. 2 at 40, 46, 52, 58. The adjustment requests were filed under section 58 of *SIMA* and subsection 32.2(2) of the *Customs Act*.

13 Exhibit EA-2019-001-04C (protected), Vol. 2 at 36, 79.

14 *Ibid.* at 69, 79.

15 Exhibit EA-2019-001-04C (protected) at Tab G, Vol. 2.

16 Exhibit EA-2019-001-04C (protected) at Tab A, Vol. 2.

17 Exhibit EA-2019-001-04C (protected), Vol. 2 at 222.

the resolution of the appeal. It also requested that, should the Tribunal grant intervener status to either party, it exercise its discretion to limit their roles. On November 22, 2019, the CBSA advised the Tribunal that it did not object to the proposed intervention of AMLPC and Gerdau. On November 29, 2019, AMLPC and Gerdau filed submissions in response to Ferrostaal's submissions opposing their intervention.

[18] On December 5, 2019, the Tribunal granted AMLPC and Gerdau the status of interveners in this proceeding as it was satisfied that they had a direct interest in the appeal, which may not otherwise be adequately represented by the CBSA. The Tribunal did, however, direct that AMLPC and Gerdau strictly limit their submissions and evidence to that which was relevant to the appeal and avoid broadening the scope of the appeal beyond that which was contemplated in Ferrostaal's notice of appeal and brief.

[19] On March 3, 2020, the Tribunal held a hearing on the basis of written submissions in accordance with rule 25.1 of the *Canadian International Trade Tribunal Rules*.

OVERVIEW OF THE PARTIES' POSITIONS

Ferrostaal

[20] Ferrostaal presented a five-prong argument in this appeal. First, it submitted that the CBSA's decision to retroactively re-assess the imported goods using the NVs established for BMZ in the re-investigation that concluded on May 4, 2018, was an unsolicited determination that Ferrostaal did not raise in its request for re-determination. It submitted that the reason for the appeal was to correct the exporter's identity and that it never appealed the calculation or determination of NVs in its request.

[21] Second, it submitted that the application of the Statement made in the Notice to the imported goods was an unwarranted decision to retroactively assess AD duties taken outside the CBSA's own published policies devoted to retroactive assessments and constitutes a remarkable departure from Canada's well-established prospective duty enforcement system. It also submitted that the Statement was applied in error because, as a matter of fact, there was no appeal pending for the imported goods at the time of the re-investigation.

[22] Third, it submitted that the CBSA's retroactive assessment resulted from denials of natural justice and procedural fairness owed to Ferrostaal. Ferrostaal submitted that it was not provided any opportunity to make submissions to the CBSA regarding the application of the NVs established for BMZ in the re-investigation to the imported goods.

[23] Fourth, it submitted that the CBSA abused its discretion by failing to consider all relevant information with respect to the imported goods, by causing an unfair and unreasonable result, and by applying an erroneous view of the applicable law and policy in making its decision under section 59 of *SIMA*.

[24] Finally, Ferrostaal submitted that the CBSA's retroactive assessment breached its legitimate expectation that, in Canada's prospective duty enforcement system, AD duties will only be assessed retroactively in the exceptional and precise circumstances enumerated by the CBSA, which it claims do not exist in the present case.

CBSA

[25] The CBSA submitted that the appeal should be dismissed as Ferrostaal's position that the CBSA should have used outdated NVs (i.e. the NVs existing at the time the imported goods were released from customs), and that the scope of the President's re-determination is restricted to the terms of an importer's request, was rejected by the Tribunal in *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency*.[18]

[26] The CBSA submitted that the President's use of NVs that reflect the commercial conditions at the time of the transaction is consistent with the CBSA's statutory mandate to collect AD duties "equal to" the margin of dumping, as well as with the CBSA's practice where a request for re-determination has been made. It further submitted that section 59 of *SIMA* empowers the President to re-determine any determination or re-determination referred to in sections 55, 56 or 57 in respect of any imported goods.

[27] The CBSA also submitted that the procedural fairness issues raised by Ferrostaal are not relevant to the questions the Tribunal must decide on this appeal.

Interveners

[28] Both AMLPC and Gerdau expressed their agreement with the CBSA's submissions and made some additional submissions, which will be addressed further below when considered relevant to the determination of this appeal.[19]

ANALYSIS

[29] There is no dispute between the parties that the imported goods were subject to the Tribunal's finding in Inquiry No. NQ-2016-003 and that the exporter of those goods for *SIMA* purposes was BMZ. There is also no dispute as to the methodology employed by the CBSA in both its original investigation and re-investigation to calculate the NVs for BMZ, the methodology employed to calculate the export prices of the imported goods or the resulting values for both.

[30] This appeal only raises a single issue, i.e. whether the NVs applicable to the imported goods should be those established for BMZ during the CBSA's re-investigation, as determined by the President of the CBSA, or those established during the CBSA's original investigation, as claimed by Ferrostaal.

[31] The Tribunal notes that, in this case, it is Ferrostaal that bears the initial burden of establishing, on a *prima facie* basis, that the President's re-determination of NVs made pursuant to section 59 of *SIMA* is invalid or incorrect.[20] Ferrostaal has not met this burden for the reasons that follow.

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18 (29 October 2014), AP-2012-035 (CITT) [*Canadian Tire*].

19 The Tribunal notes that the interveners made various submissions that are not relevant to the appeal and that seek to improperly broaden the scope of the appeal contrary to the Tribunal's instructions. The Tribunal agrees with Ferrostaal that these submissions should be disregarded. In particular, the Tribunal has disregarded the submissions made by AMLPC at paragraphs 32-37, 61 and 70 of its brief and the submissions made by Gerdau at paragraphs 12-15 of its brief.

20 See *Canadian Tire* at paras. 37, 39; *Sugi Canada Ltée v. Deputy M.N.R.C.E.* (17 December 1992), AP-92-013 (CITT) at 3; *United Wood Frames Inc. v. President of the Canada Border Services Agency* (7 June 2012), AP-2011-039 (CITT) at para. 10.

Ferrostaal's request under subsection 58(1.1) of *SIMA* was for the re-determination of the NVs applicable to the imported goods

[32] Ferrostaal submitted that it never appealed the calculation or determination of NVs in the request for re-determination that it made pursuant to subsection 58(1.1) of *SIMA*. It submitted that its request was related to the identity of the exporter and the routing of the shipment of the imported goods, and therefore only consequentially related to the NVs applicable to those goods. It characterized the situation as that of the CBSA giving itself jurisdiction to make a finding on its own initiative.

[33] AMLPC submitted that, to the contrary, Ferrostaal's request for re-determination was necessarily about NVs since such requests are limited to five instances, which include a re-determination of NVs, but not an exporter's identity. In the same vein, Gerdau submitted that Ferrostaal's claim that the identity of the exporter is somehow divorced from the determination of NVs and ultimate anti-dumping duty liability ignores the very text of subsection 56(1) of *SIMA*, which indicates that all determinations and re-determinations are about subjectivity, NVs and export prices. It submitted that, in this case, the re-determination under section 59 was simply the result of the President applying the appropriate NVs issued to the exporter of the imported goods.

[34] The CBSA, AMLPC and Gerdau also submitted that, in *Canadian Tire*, the Tribunal determined that the President is not confined to the issues raised in a request for re-determination made pursuant to subsection 58(1.1) of *SIMA*, but can consider other aspects that relate to anti-dumping duty liability, including the accuracy of NVs applied to a transaction.

[35] In the Tribunal's opinion, subsections 56(1) and 56(2) of *SIMA* make it explicitly clear that determinations and deemed determinations made thereunder pertain to five elements, these being the subjectivity, NV and export price of goods that are imported, as well as the amount of subsidy and amount of export subsidy, if any, on those goods. Therefore, it logically follows that requests for re-determination, and re-determinations, made pursuant to sections 56 to 59 must necessarily pertain to one or more of these five elements. This was recognized by the Tribunal in *Canadian Tire*.[21]

[36] In the present case, although Ferrostaal claims that the request it made under subsection 58(1.1) of *SIMA* merely sought to correct a mistake of fact (i.e. to change the identity of the exporter of the imported goods from Pisec to BMZ), and that this was therefore only consequentially related to NVs, the fact of the matter is that its request was primarily and fundamentally a request for the re-determination of the NVs applicable to the imported goods. Indeed, the CBSA had previously re-determined, under paragraph 57(b), the NVs for the imported goods as an advance of 108.5% over the export price of the goods and Ferrostaal was now attempting to have the NVs established for BMZ during the CBSA's original investigation applied to the imported goods. In other words, the identity of the exporter was of importance to Ferrostaal only insofar as it would impact the NVs applicable to the imported goods and, ultimately, the margin of dumping and the resulting anti-dumping duty liability.

[37] Therefore, in addressing Ferrostaal's request for re-determination, the President of the CBSA had to first determine whether BMZ was the exporter of the imported goods, as was claimed by Ferrostaal. While the President did conclude that BMZ was the exporter, this was not an end in itself. The President then had to turn his mind to the issue of determining which NVs to apply; the ones that

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21 *Canadian Tire* at para. 45.

had been established for BMZ during the CBSA's original investigation or the ones established during the re-investigation. The President could not avoid this issue.

[38] Even if the Tribunal considered that the foregoing was insufficient to demonstrate that Ferrostaal's request for re-determination pertained to NVs, it would still conclude, on the basis of its decision in *Canadian Tire*, that the President, in addition to addressing the issue raised by Ferrostaal in its request (i.e. the identity of the exporter), had the discretion to also re-determine the NVs applicable to the imported goods.[22]

The President's application of updated NVs to the imported goods was in accordance with *SIMA* and CBSA policy

[39] Ferrostaal submitted that, under Canada's prospective duty enforcement system, any new NVs issued pursuant to a re-investigation apply to importations from the date that they are issued, subject to very limited exceptions for retroactive application. It submitted that the CBSA's policy on re-investigations, as reflected in Memorandum D14-1-8,[23] elaborates on the exceptions for retroactive application and that these only include cases where exporters do not report changes to domestic prices, costs, market conditions or terms of sale to the CBSA as required.

[40] Ferrostaal further submitted that, while the CBSA's guidance on re-determinations set out in Memorandum D14-1-3[24] provides that a re-determination will be made on the basis of NVs and export prices using information from the same period as the date of sale to Canada of the imported goods or the most recently available information before that, it does not address re-determinations for requests that are not made on the basis of NVs and export prices, as is the case here.

[41] As for the Statement made in the Notice, Ferrostaal submitted that it does not apply to the imported goods because there was no appeal pending for the goods at the time of the conclusion of the re-investigation, its request for re-determination being filed almost seven months later. It submitted that, to have an "appeal" that has "yet to be re-determined", as mentioned in the Statement, an appeal must exist (i.e. it must have been properly filed), and the CBSA must not have completed its re-determination, at the time of the conclusion of the re-investigation.

[42] The CBSA submitted that, in *Canadian Tire*, the Tribunal noted that Canada's prospective duty enforcement system contains certain retrospective elements and found that the application of updated NVs in a section 59 re-determination was permitted by *SIMA* and consistent with the CBSA's established practice as reflected in its policies. It submitted that, similarly, in this appeal, the use of updated NVs is consistent with its practice as outlined in Memorandum D14-1-3.

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22 See *Canadian Tire* at para. 68, where the Tribunal concluded that "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". The Tribunal's decision on this point was subsequently upheld by the Federal Court of Appeal, who substantially agreed with the Tribunal's analysis and conclusions. See *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency*, 2016 FCA 20 at para. 6.

23 (19 July 2019), "Re-investigation and Normal Value Review Policy – *Special Import Measures Act* (SIMA)". Exhibit EA-2019-001-17 at Tab 4, Vol. 1.

24 (23 November 2018), "Re-determinations and Appeals Under the *Special Import Measures Act*". Exhibit EA-2019-001-17 at Tab 5, Vol. 1.

[43] The CBSA further submitted that the Statement it made in the Notice applies to both existing and future appeals and that it would be illogical and counter to the requirements of *SIMA* for the CBSA to apply outdated NVs when making a section 59 re-determination solely on the basis of when the appeal was filed. It submitted that, where updated NVs that reflect market conditions are available, such as is the case here, they will be applied to the goods under appeal no matter when the appeal was filed. It added that, as stated by the Tribunal in *Canadian Tire*, the use of updated NVs is consistent with the requirement in section 3 of *SIMA* that AD duties be collected in an amount equal to the margin of dumping of imported goods.

[44] AMLPC submitted that the CBSA's policy statements and notices are not sources of law that confer or define the CBSA's legal authority to re-determine NVs under section 59 of *SIMA*. It submitted that this position is consistent with decisions from both the Federal Court of Appeal and the Tribunal on this matter.[25] In the alternative, it agreed with the CBSA that the Statement made in the Notice applies to both existing appeals and appeals that may be filed subsequently to the close of a re-investigation. AMLPC and Gerdau both agreed with the CBSA that the use of updated NVs in this instance was consistent with *SIMA*, CBSA policy and the applicable jurisprudence.

[45] In reply, Ferrostaal submitted that the CBSA's argument that the Statement in the Notice applies to both existing and future appeals cannot stand because that interpretation is not supported by a plain reading of the Notice.

[46] Ferrostaal submitted that, if one were to agree with the CBSA (and the Tribunal's decision in *Canadian Tire*) that the use of updated NVs is consistent with the duty liability provisions of *SIMA*, all importations would be retroactively assessed to ensure that the margin of dumping was calculated on every sale of subject goods, which would be a repudiation of the endorsement of Parliament for a prospective duty enforcement system.

[47] Ferrostaal added that requiring importers to engage with an arbitrary system where filing a request for re-determination amounts to rolling the dice and potentially being retroactively assessed, even where there is no allegation of wrongdoing, also nullifies the express intent of the prospective system to provide certainty and predictability. It submitted that importers would therefore be strongly incentivized to avoid correcting errors, however minor and clerical, to prevent such retroactive assessments.

[48] Finally, Ferrostaal submitted that, because the date of sale of the imported goods fell outside the period covered by the re-investigation, the CBSA did not actually have information from the same period as the date of sale. It submitted that relying on "the most recently available information" as indicated in Memorandum D14-1-3, when this information does not relate to the date of sale, is unfair because it is an arbitrary exercise of the CBSA's discretion that has a disproportionately negative impact on Ferrostaal.

[49] Under *SIMA*, dumping occurs when the selling prices of goods that are imported into Canada (i.e. the export price of the goods) are lower than the NVs of those same goods. The NV of goods that are imported from an exporter is generally the amount for which that exporter sells like goods (i.e. goods that are identical or similar to the goods that are imported) in its own country, or the

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25 *The Minister of National Revenue and Canada Revenue Agency v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras. 107-108; *Digital Canoe Inc. v. President of the Canada Border Services Agency* (22 August 2016), AP-2015-026 (CITT) at para. 25.

aggregate of the cost of production of the goods that are imported combined with a reasonable amount for administrative, selling and all other costs and a reasonable amount for profits derived from the exporter's sales of like goods in its domestic market.[26] In cases where sufficient information is not provided or is not available to enable the determination of NVs, section 29 allows for the NVs to be determined in such manner as the Minister specifies. These NVs are generally expressed as an advance over export price. The use of a ministerial specification is commonly used where exporters do not cooperate with the CBSA in an investigation or re-investigation and usually results in a less favorable outcome.

[50] *SIMA* and its underlying international agreement, the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*[27](*Anti-dumping Agreement*), require that there is a fair comparison between the NV and the export price, i.e. the sales chosen for the comparison must be made on as close to an "apples to apples" basis as possible. This includes the requirement in Article 2.4 of the *Anti-dumping Agreement* that the "comparison [between the NV and the export price] shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time." The fair comparison requirement is reflected in *SIMA* in the statutory provisions governing the calculation of NVs, which generally require that the sales selected for the calculation of NVs occur reasonably close in time to the date of the sale(s) for export to Canada.[28]

[51] In the duty assessment context, as noted by the Tribunal in *Canadian Tire*, section 3 of *SIMA* provides that AD duties are to be levied in an amount "equal to" the margin of dumping of the goods that are imported into Canada. As "margin of dumping" is defined as the amount by which the NV of the goods exceeds the export price of the goods,[29] on its face, this provision would appear to require that a NV be established and compared to the export price for every sale of subject goods into Canada. In order to comply with the fair comparison requirement, any sale or sales chosen to establish the NV would have to occur close in time to the date of sale of the subject goods.

[52] However, under Canada's prospective duty enforcement system, NVs based on data on sales and costs collected during the CBSA's one-year period of investigation are established by the CBSA at the close of an investigation and communicated to exporters. Subject goods priced at or above their specific NVs will not incur any anti-dumping duty liability on importation into Canada.[30] Stated differently, anti-dumping duty liability can be eliminated by increasing the selling price of the goods (i.e. the export price of the goods) to a level that is at or above the NVs previously established by the CBSA (i.e. the prospective NVs). The use of such a system has been said to effectively protect domestic producers from injury caused by dumped goods as well as to provide predictability to foreign exporters and Canadian importers who are aware of duty liability.[31]

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26 See sections 15 and 19 of *SIMA* and sections 11 and 13 of the *Special Import Measures Regulations*. Under certain circumstances, which are defined in paragraphs 20(1)(a) and (b), NVs can be based on the price or costs of like goods in a country other than the country of export.

27 Online at: https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

28 As NVs calculated on the basis of the cost of production will use the actual costs attributable to the exported goods, there is no "comparison" required here.

29 See subsection 2(1) of *SIMA*.

30 *Canadian Tire* at para. 75.

31 *Report on the Special Import Measures Act* by the Sub-Committee on the Review of the Special Import Measures Act of the Standing Committee on Finance and the Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade, House of Commons, Ottawa, December 1996 (online: https://www.ourcommons.ca/Content/Archives/Committee/352/fine/reports/06_1996-12/chap4-e.html) [*1996 SIMA Review*].

[53] Changing market conditions may mean that the NVs established during the investigation are no longer reflective of the prices (and costs) of the goods in the exporter's home market. This may mean that dumping is no longer occurring on export sales to Canada or, conversely, that subject goods are being dumped at higher margins than in the original investigation.

[54] In order to keep prospective NVs up to date to reflect current market conditions, the CBSA conducts re-investigations on a periodic basis.[32] The NVs issued to exporters at the conclusion of these re-investigations, which are normally based on data pertaining to the one-year period immediately preceding the date of initiation of the re-investigations, then apply to all subsequent importations of subject goods.[33]

[55] That being said, while Canada's prospective duty enforcement system is well established and appears to provide a certain level of predictability to foreign exporters and Canadian importers, the fact remains that it is entirely operationalized through administrative policies and procedures. There is in fact no mention of prospective NVs—or re-investigations for that matter—in *SIMA*, its regulations or any other law pertaining to customs matters.[34]

[56] Indeed, when subject goods are imported, subsection 56(1) of *SIMA* allows for a CBSA designated officer to make a determination of the NV of those goods. This aligns with the requirement in section 3, stated above, that duties are to be levied in an amount "equal to" the margin of dumping of the goods that are imported into Canada, in that it allows the officer to establish a NV and export price for each individual importation of subject goods. If such a determination is not made within 30 days after the goods were accounted for under the *Customs Act*, subsection 56(2) provides that a determination is deemed to have been made in accordance with the information provided by the person accounting for the goods at the time of the accounting.

[57] Thus, by logical extension, any re-determinations of NVs made by a CBSA designated officer pursuant to section 57 of *SIMA*, or by the President pursuant to section 59, must also be in respect of the goods that are actually imported. As noted by the Tribunal in *Canadian Tire*, the scheme of sequential administrative mechanisms in sections 55 to 59 that allow for the determination, re-determination and further re-determination of issues such as NVs is retrospective in nature.[35]

[58] Notwithstanding the above, the prospective duty enforcement system appears to function adequately for what the Tribunal believes are two main reasons. First, the information that would be required to calculate NVs for the goods that are actually imported is not available at the time of importation (this information is normally gathered during re-investigations which take several months to complete). Second, the CBSA does not usually make determinations under subsection 56(1).[36] This results in deemed determinations under subsection 56(2), which are made on the basis of the prospective NVs declared by the importer at the time of accounting. While these

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32 These re-investigations are also conducted to update export prices and, where applicable, amounts of subsidy. See Memorandum D14-1-8.

33 *Canadian Tire* at footnote 4.

34 See *Robertson Inc. v. President of the Canada Border Services Agency* (25 January 2016), EA-2014-002 and EA-2014-003 (CITT) [*Robertson*] at para. 46, where the Tribunal noted that re-investigations are not provided for by *SIMA*.

35 *Canadian Tire* at para. 76.

36 As noted by Parliament in the *1996 SIMA Review*, the large volume of importations made into Canada and the need to expedite the import process makes it impracticable to review every transaction at the time of importation.

deemed determinations are routinely reviewed by the CBSA as part of its regular enforcement activities, as it did here with the goods imported by Ferrostaal, unless they are based on incorrect information, as was the case here,[37] importers can rest assured that the CBSA will not make a re-determination.[38]

[59] However, when the CBSA does make a re-determination, whether on its own initiative because a deemed determination was based on information that was incorrect at the time of accounting or in response to a request made by an importer, it is normally in possession of more recently established NVs as the re-determination is made some time after the goods were imported, especially so in cases where the re-determination is made pursuant to section 59 of *SIMA*.[39] These newer NVs are likely to have been determined on the basis of information that is contemporaneous with the sale of the goods to the importer in Canada or, at the very least, on the basis of information that is more recent than that used to establish the NVs that were relied upon at the time of importation. In the Tribunal's view, if the CBSA were to ignore these newer NVs in favour of the older ones, it would be disregarding the clear wording of the duty liability, NV and re-determination provisions of *SIMA*.[40]

[60] In the present case, Ferrostaal entered into a sales contract for the imported goods on November 17, 2017, and the NVs established by the CBSA during the re-investigation were determined on the basis of information collected for the period from May 1, 2016, to October 31, 2017. In contrast, the NVs established during the CBSA's original investigation, which Ferrostaal claimed should apply, were determined on the basis of information collected for the period from June 1, 2015, to May 31, 2016. Accordingly, the Tribunal concludes that, when it made its re-determination under section 59, the President correctly applied the more recent NVs to the imported goods.

[61] The Tribunal notes that this conclusion is consistent with the CBSA's established practice, as reflected in the Statement it made in the Notice and in Memoranda D14-1-8 and D14-1-3, which outline the circumstances in which NVs will be applied retroactively. Although Ferrostaal claimed that the retroactive application of NVs in the absence of any wrongdoing by importers or exporters nullifies the express intent of Canada's prospective duty enforcement system to provide certainty and predictability, it provided no concrete evidence to show that the intent of the system was for absolute certainty and predictability. In any event, given the statutory scheme of *SIMA*, such absolute certainty and predictability is impossible and importers should, as result, exercise caution when accounting for goods at the time of their importation.

[62] The part of the Statement made in the Notice whose interpretation is contested by the parties reads as follows: "In addition, the normal values . . . determined on the basis of the current re-investigation will be applied to any entries of subject goods under appeal that have yet to be

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37 As mentioned above, Ferrostaal's customs broker misidentified the exporter as Pisec, an exporter who had not been issued NVs by the CBSA.

38 See Memorandum D14-1-3 at para. 36.

39 In most cases, a re-determination made by the President under section 59 of *SIMA* will be the second level of review following a re-determination made by a designated officer under section 57, which is the first level of review.

40 See *Canadian Tire* at para. 72, where the Tribunal implied that the use of updated information pertaining to the NVs of transactions that more accurately reflect the commercial conditions at the time at which the transactions took place was necessary for the CBSA to exercise its discretion in accordance with the duty liability provisions of *SIMA* and its statutory mandate to collect anti-dumping duties "equal to" the margin of dumping.

re-determined at the time of the conclusion of this re-investigation." It is apparent to the Tribunal that this was meant to address the only situation where a doubt could potentially arise as to how the CBSA would proceed, i.e. where a request for re-determination is made before the conclusion of a re-investigation, but the re-determination is made afterwards. Indeed, it would be nonsensical to interpret the Statement in such a manner that the situation previously described would require the application of updated NVs, but that a request for re-determination made after the conclusion of a re-investigation would require the application of older NVs. The Tribunal is therefore of the view that the only rational interpretation of the Statement is that *all* re-determinations that are made by the CBSA after the conclusion of a re-investigation will use updated NVs, regardless of when the request was made.[41]

[63] This interpretation is also consistent with the CBSA's D-Memoranda. Memorandum D14-1-8 states that information obtained during a re-investigation may be used to determine NVs in respect of requests for re-determinations that have not yet been processed and that this may result in additional duties being payable. It reads as follows:

> 26. Information obtained during the re-investigation or normal value review may be used to determine values in respect of requests for re-determinations that have not been processed by the CBSA as of the date the re-investigation or normal value review is concluded. This may result in an additional duty assessment or a refund depending on the specific situation. Please consult Memorandum D14-1-3 for information on re-determinations and appeals procedures.

[64] Memorandum D14-1-3 is even clearer yet, stating that re-determinations will be based on NVs that are contemporaneous to the date of sale of the goods that are imported or the most recently available NVs. It also reminds importers that a request for re-determination may result in the assessment of additional duty. It reads as follows:

> 27. Where a request for re-determination is filed properly, the CBSA will review the information, evidence, facts and arguments. In the case of anti-dumping duties, the re-determination will be on the basis of normal values and export prices, using information from the same period as the date of sale to Canada of the imported goods, or the most recently available information before that. […]
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> 28. Importers are reminded that a request for re-determination will not necessarily result in the reimbursement of duty and may result in the assessment of additional duty.

[65] In light of the foregoing, the Tribunal can only conclude that the President's application of updated NVs to the imported goods was in accordance with *SIMA* and the CBSA's established practice, as reflected in its own published policies.

The degree of procedural fairness accorded to Ferrostaal by the President is not relevant in this case

[66] Ferrostaal submitted that the CBSA denied it the procedural fairness that it was owed by requiring that it submit a formal request for re-determination to correct the mistake it made with respect to the identity of the exporter, which required that Ferrostaal pay the AD duties owing on the

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41 This essentially means that, once issued, updated NVs are to be used in all circumstances, whether by importers accounting for goods or by the CBSA in making re-determinations.

imported goods, when the mistake could have been resolved reasonably and efficiently if the CBSA had simply cancelled the re-determination it made under paragraph 57(b) of *SIMA* as had been requested by Ferrostaal.

[67] Ferrostaal submitted that the CBSA also denied it the procedural fairness that it was owed by applying its administrative policy in error to its section 59 re-determination, entirely on its own initiative (i.e. without Ferrostaal requesting that the CBSA re-determine the NVs), and without providing Ferrostaal any notice that it intended to do so or granting Ferrostaal a meaningful opportunity to present its case before the retroactive assessments were applied.

[68] The CBSA and AMLPC noted Ferrostaal's acknowledgement that the Tribunal has consistently held that it does not have jurisdiction over procedural fairness matters as grounds of appeal.[42] The CBSA also submitted that, while the procedural fairness issues raised by Ferrostaal are not relevant to this appeal, it still does not agree that the procedure that resulted in the paragraph 57(b) re-determination was unfair or that the application of the updated NVs was unfair.

[69] As noted by all parties, the Tribunal has repeatedly held that it does not have jurisdiction to consider issues of procedural fairness as standalone grounds of appeal. In *Toyota Tsusho*, for example, the Tribunal stated that it "does not have the authority to consider, in appeals pursuant to section 61 of SIMA, issues of natural justice and procedural fairness relating to the manner in which the CBSA's decision was reached."[43]

[70] The Tribunal reasoned that, because appeals before it proceed *de novo* and its own process is procedurally fair, the eventual result of an appeal is a new determination made in a fair and transparent manner.[44] It therefore stated that questions relating to the degree of procedural fairness accorded to the appellant by the CBSA in that case were irrelevant for the purposes of the appeal to the Tribunal.[45] The Tribunal is of the view that the same reasoning applies in the present appeal as well. Ultimately, it is not the role of the Tribunal to comment on the content of the duty of procedural fairness owed to Ferrostaal by the CBSA.

[71] The Tribunal notes that, in *Robertson*, it held that "questions of procedure or fairness of treatment before the CBSA may, in certain cases, shed some light on the correctness of a CBSA determination in respect of an issue properly within the Tribunal's jurisdiction."[46] It explained that "[f]rom a factual perspective, the procedures followed by the CBSA, while not in and of themselves grounds of appeal, may have some connection with the ultimate decision to be reached *de novo* on appeal."[47] The Tribunal is of the view that this is not the case in the present appeal as the procedural defects alleged by Ferrostaal have no bearing on the issue of which NVs are applicable to the imported goods, which the Tribunal has already determined were the updated NVs applied by the President.

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42 See Exhibit EA-2019-001-04 at para. 58, Vol. 1.

43 *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) [*Toyota Tsusho*] at para. 6. See also *Robertson* at para. 12.

44 *Toyota Tsusho* at para. 8.

45 *Toyota Tsusho* at para. 9.

46 *Robertson* at para. 13.

47 *Ibid.*

The CBSA did not abuse its discretion as claimed by Ferrostaal

[72] Ferrostaal submitted that the CBSA abused its discretion in three ways. First, it submitted that, both before and after issuing the re-determination under paragraph 57(b) of *SIMA*, the CBSA failed to consider relevant information already on file, as well as information submitted by Ferrostaal, that would have allowed it to either conclude that the NVs established for BMZ should have been used, which would have avoided the re-determination, or allowed it to administratively correct the mistake of fact as to the identity of the exporter and cancel the re-determination. It added that these continuing and cumulative failures to consider relevant information resulted in an arbitrary situation where the imported goods were assessed differently than those from another import transaction of the same subject goods purchased at the same time and under identical terms.

[73] Second, Ferrostaal submitted that the CBSA's retroactive assessment of AD duties in this instance has led to an unfair, unreasonable and therefore improper result. It submitted that, in a prospective duty enforcement system, there is no reasonable purpose that can be achieved by retroactively assessing AD duties where there is no wrongdoing by the importer or the exporter. It submitted that, in the present case, it used its appeal rights under *SIMA* to correct an error, but was punitively assessed AD duties on a retroactive basis.

[74] Third, it submitted that the CBSA abused its discretion by making a retroactive assessment of AD duties based on an erroneous view of *SIMA* and its own policies. In particular, it submitted that the CBSA's application of its policy set out in Memorandum D14-1-3 to an appeal made on an issue other than NVs, and where no submissions have been made on NVs, is improper and abuses the intent of the policy and the law to which it is intended to give effect.

[75] The CBSA submitted that the issues raised by Ferrostaal are not relevant to this appeal. Nevertheless, it submitted that it had proper grounds to make its re-determination under paragraph 57(b) of *SIMA* as Pisec was identified as the exporter on the customs documentation and its existence, and role relative to BMZ, was not known to the CBSA at the time. The CBSA added that it could not effect an administrative correction and cancel the assessment because the error made by Ferrostaal's customs broker did not qualify as a clerical error reviewable under subsection 12(2) of *SIMA*.

[76] The issue before the Tribunal in this appeal is the correctness of the President's re-determination under section 59 of *SIMA*. Hence, the CBSA's actions, both before and after it made its re-determination under paragraph 57(b), are of no relevance to the issue of which NVs are applicable to the imported goods. Moreover, even if the imported goods were assessed differently than those from a similar import transaction, this does not, in the Tribunal's view, serve to prove that the CBSA abused its discretion. Rather, in this case, it simply attests to the fact that the transactions were each assessed in accordance with the statutory scheme of *SIMA* and CBSA policy. While the transaction that contained an error was the subject of a re-determination, the other transaction was not.[48]

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[48] While the deemed determination pertaining to the imported goods was based on incorrect information (Pisec was identified as the exporter) and was therefore the subject of a re-determination by the CBSA, it is assumed that the other transaction was not based on incorrect information and that this is the reason for it not being the subject of a re-determination. See Memorandum D14-1-3 at para. 36.

[77] Ultimately, given the Tribunal's conclusions above that Ferrostaal's request for re-determination was primarily and fundamentally a request for the re-determination of the NVs applicable to the imported goods and that the President's application of updated NVs to the imported goods was in accordance with *SIMA*, as well as with the CBSA's policies set out in Memoranda D14-1-8 and D14-1-3, Ferrostaal's claims with respect to abuse of discretion are moot.

The President's application of updated NVs to the imported goods did not breach Ferrostaal's legitimate expectations

[78] Ferrostaal submitted that, through consistent representations, the CBSA created the legitimate expectation that it would apply AD duties retroactively only in exceptional circumstances, where it was not advised of changes in market conditions in a timely manner, which it claims was not the case here. It submitted that, in these circumstances, if the CBSA was to apply AD duties retroactively, it had a more onerous procedural duty.[49]

[79] The Tribunal notes that, in *Agraira*, which was cited by Ferrostaal, the Supreme Court of Canada acknowledges that the doctrine of legitimate expectations does not give rise to substantive rights, but only the granting of appropriate procedural remedies.[50] Therefore, even if the CBSA had created the legitimate expectation that it would only apply AD duties retroactively in cases of wrongdoing by the importer or exporter, this would only result in the requirement that it provide Ferrostaal with a greater degree of procedural fairness. However, as mentioned above, the Tribunal does not have the authority to consider, in appeals pursuant to section 61 of *SIMA*, issues of procedural fairness relating to the manner in which the CBSA's decision was reached.

[80] In any event, given the Tribunal's conclusion that the President's application of updated NVs to the imported goods was in accordance with *SIMA* and the CBSA's own policies, Ferrostaal's claim that the CBSA created the legitimate expectation that it would only apply AD duties retroactively where there has been wrongdoing is entirely unfounded.

The Tribunal's final remarks in *Canadian Tire* were made in *obiter* and do not change the outcome of the present appeal

[81] Ferrostaal submitted that the CBSA and the interveners neglected to mention the Tribunal's final remarks in *Canadian Tire*, which address the Tribunal's concern that the CBSA has effectively deprived importers of their legal right under subsection 12(2) of *SIMA* to address minor clerical and arithmetic errors without being required to submit to an onerous and complex re-determination process, which Ferrostaal added often results in punitive retroactive assessments of AD duty. It submitted that this is exactly the situation in which it found itself in.

[82] The CBSA submitted that it was not clear that it had any legitimate basis for vacating its re-determination under paragraph 57(b) of *SIMA* as the error made by Ferrostaal's customs broker did not qualify as a clerical error reviewable under subsection 12(2). It therefore submitted that Ferrostaal had to use the appeal provisions of section 58.

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49 Ferrostaal made reference to a decision of the Supreme Court of Canada wherein it was held that, if representations with respect to a substantive result have been made, more onerous procedures must be followed before making a contrary decision. See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) [*Agraira*] at para. 94.

50 *Agraira* at para. 97.

[83] 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.

[84] In *Canadian Tire*, the Tribunal remarked, in *obiter*, that it was not unsympathetic to the appellant's situation, insofar as its request that the date of sale for the transactions at issue in that appeal resulted in the unexpected incurrence of new and significant AD duty liability.[51] The Tribunal added that, while subsection 12(2) of *SIMA* was not available to the appellant in the circumstances of that case, it was concerned about the CBSA's apparent failure to have operationalized that provision for the correction of clerical and arithmetic errors, with the result being automatic default to the typically more complex and resource-intensive re-determination process.[52]

[85] The Tribunal is similarly not unsympathetic to Ferrostaal's situation in the present appeal, as the error made by its customs broker ultimately resulted in significant AD duty liability. However, that liability was the result of the President complying with the statutory scheme of *SIMA* and correctly applying the updated NVs to the imported goods.

[86] As for subsection 12(2) of *SIMA*, the question as to whether it could potentially have been available to Ferrostaal, or whether the CBSA has even taken steps to operationalize it, is irrelevant to the issue before the Tribunal in this appeal. The Tribunal cannot review the CBSA's re-determination under paragraph 57(b) or its decision to make such a re-determination instead of exercising its discretion to use subsection 12(2). Ferrostaal subsequently made a valid request for re-determination under subsection 58(1.1) and it was therefore entirely proper for the President to make a re-determination under section 59. At issue in this appeal is the correctness of the President's re-determination. The Tribunal has already concluded that the re-determination was in accordance with *SIMA* and CBSA policy, and therefore correct.

DECISION

[87] The appeal is dismissed.

Serge Fréchette

Serge Fréchette
Presiding Member

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51 *Canadian Tire* at para. 113.

52 *Ibid.* at para. 114.