Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal EA-2019-005

Acierco KSE Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Wednesday, March 16, 2022

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on September 8, 2020, pursuant to subsection 61(1) of the *Special Import Measures Act*;

AND IN THE MATTER OF four decisions of the President of the Canada Border Services Agency, dated September 12, 2019, made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

ACIERCO KSE INC. **Appellant**

AND

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

DECISION

The appeal is dismissed.

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	Via videoconference
Date of Hearing:	September 8, 2020
Tribunal Panel:	Serge Fréchette, Presiding Member
Tribunal Secretariat Staff:	Alain Xatruch, Counsel Kalyn Eadie, Counsel Sarah Perlman, Counsel Julie Lescom, Registrar Officer

PARTICIPANTS:

Appellant	**Counsel/Representatives**
Acierco KSE Inc.	Jesse Goldman Ewa Krajewska Julia Webster
Respondent	**Counsel/Representatives**
President of the Canada Border Services Agency	Alexander Gay Mary Roberts Marshall Jeske
Interveners	**Counsel/Representatives**
ArcelorMittal Long Products Canada G.P.	Paul Conlin Anne-Marie Oatway
Gerdau Ameristeel Corporation	Christopher J. Kent Christopher J. Cochlin Andrew Lanouette Michael Milne Marc McLaren-Caux Cynthia Wallace Andrew Paterson Melisa Celebican Susana May Yon Lee

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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal by Acierco KSE Inc. (Acierco), filed on November 13, 2019, pursuant to subsection 61(1) of the *Special Import Measures Act*[1] (SIMA), from four decisions made by the President of the Canada Border Services Agency (CBSA), pursuant to section 59 of SIMA, on September 12, 2019, with respect to the imposition of anti-dumping (AD) duties on certain concrete reinforcing bar (rebar) imported from the Republic of Turkey (Turkey) by Acierco (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 third re-investigation, which concluded on May 4, 2018, as determined by the President of the CBSA, or those in place at the time that the goods were released from customs (i.e. the NVs established during the CBSA's first re-investigation, which concluded on June 29, 2016), as claimed by Acierco.

PROCEDURAL HISTORY

[3] On December 10, 2014, the President of the CBSA made final determinations of dumping with respect to certain rebar originating in or exported from the People's Republic of China (China), the Republic of Korea and Turkey and of subsidizing with respect to certain rebar originating in or exported from China (collectively, the subject goods). The CBSA also established specific NVs for all exporters that cooperated with its investigation (i.e. for exporters of the subject goods that provided a complete response to the CBSA's request for information).

[4] On January 9, 2015, the Tribunal issued its finding that the dumping and subsidizing of the subject goods had not caused injury but were threatening to cause injury to the domestic industry (i.e. the domestic producers of rebar of the same description as the subject goods).[2] Accordingly, AD duties were imposed on all subject goods imported into Canada at prices below the NVs established by the CBSA during its investigation,[3] and countervailing duties were imposed on subject goods imported from China.[4]

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1 R.S.C., 1985, c. S-15.

2 *Concrete Reinforcing Bar* (9 January 2015), NQ-2014-001 (CITT) [*Rebar I*].

3 Section 3 of SIMA provides that AD 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 discussed further below, under Canada's prospective duty enforcement system, liability for AD 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 equal to or above the NVs established by the CBSA in advance of importation. The Tribunal notes that NVs for exporters that failed to cooperate with the CBSA in its investigation were established under a ministerial specification, made pursuant to subsection 29(1) of SIMA, based on the export price of the goods plus an amount equal to 41 percent of that export price. In this case, liability for AD duties may not be eliminated by increasing the selling price of the goods.

4 Countervailing duties are determined on the basis of the amounts of subsidy established for exporters by the CBSA. Unlike AD duties, liability for countervailing duties may never be eliminated by increasing the selling price of the goods.

[5] On February 9, 2016, the CBSA initiated its first re-investigation to update the NVs of the subject goods as part of its ongoing enforcement of the Tribunal's threat of injury finding.[5] The period covered by the re-investigation was from January 1 to December 31, 2015.

[6] On June 29, 2016, the CBSA concluded its first re-investigation and issued NVs to all exporters that had cooperated with the CBSA, including Çolakoğlu Metalurji A.S. (Çolakoğlu), a Turkish steel exporter. In its letter advising importers of the conclusion of the re-investigation, the CBSA indicated the following:

> Normally, normal values and amount [sic] of subsidy will not be applied retroactively. However, these measures may be applied retroactively in cases where the parties have not advised the CBSA in a timely manner of substantial changes that affect values for SIMA purposes. Therefore, where substantial changes occur in prices, market conditions, or costs associated with production and sales of the goods, or amount of subsidy received by the manufacturer, the onus is on the concerned parties to advise the CBSA.[6]

[7] On May 1, 2017, the CBSA initiated a second re-investigation to update NVs for the subject goods. The period covered by this re-investigation was from October 1, 2016, to March 31, 2017. In its letters to exporters and importers advising of the initiation of the re-investigation, the CBSA stated as follows:

> If there are changes to the exporter's domestic prices, market conditions or costs associated with production and sales, and amounts of subsidy received, the onus is on the concerned parties to advise the CBSA accordingly. When substantial changes occur and the CBSA was not advised in writing in a timely manner or the required information to make any necessary adjustments to normal values and amounts of subsidy are not provided, retroactive assessments will be applied where such action is warranted.
>
> The CBSA has indications that substantial changes may have occurred during the period of investigation (October 1, 2016 to March 31, 2017) and that the CBSA have not been advised by the exporters of these changes. If these substantial changes are confirmed during the re-investigation, retroactive assessments will be applied and impacted parties will be notified of such a decision.[7]

[8] While the second re-investigation was ongoing, Acierco made four purchases of subject goods from Çolakoğlu and imported them into Canada. Determinations regarding the subjectivity, NV and export price of the goods were deemed to have been made pursuant to subsection 56(2) of SIMA. At the time of import, no AD duties were paid by Acierco, as it assessed that the selling prices of the imported goods were at or above the prospective NVs established for Çolakoğlu during the first re-investigation (i.e. NVs established on the basis of information collected for the period from January 1 to December 31, 2015).

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5 The CBSA conducts re-investigations on a periodic basis in order to keep prospective NVs up to date to reflect current market conditions. The NVs issued to exporters at the conclusion of these re-investigations generally apply to all subsequent importations of subject goods.

6 Exhibit EA-2019-005-20 at 31.

7 *Ibid.* at 40, 44.

[9] The CBSA concluded the second re-investigation on September 1, 2017, and issued updated prospective NVs to all collaborating exporters, including Çolakoğlu.

[10] On December 4, 2017, the CBSA initiated a third re-investigation to update NVs for the subject goods, with a period of investigation of May 1, 2017, to October 31, 2017, covering the period of time during which the importations at issue were made.

[11] On May 4, 2018, the CBSA concluded the third re-investigation and issued updated NVs to all cooperating exporters, including Çolakoğlu. Importers and exporters were once again reminded of the potential for retroactive assessments in the notice of conclusion of re-investigation as follows:

> . . . where there are increases in domestic prices, and/or costs . . . , the export price should be increased accordingly to ensure that any sale made to Canada is not only above the normal value but at or above selling prices and full costs and profit of the goods in the exporter's domestic market. If exporters do not properly notify the CBSA of any such changes, do not adjust export prices accordingly, or do not provide the information required to make any necessary adjustments to normal values and export prices, retroactive assessments of anti-dumping and countervailing duties may be warranted.[8]

[12] The transactions involving the imported goods were reviewed by the CBSA as part of its regular enforcement activities. Based on the information available, the CBSA deemed it advisable to re-determine the section 56 deemed determinations. On July 18, 2018, the CBSA made four re-determinations pursuant to paragraph 57(b) of SIMA with respect to the imported goods (the section 57 re-determinations), using the NVs issued at the conclusion of the third re-investigation, which resulted in the assessment of AD duties. Acierco paid the total duties owing on August 15, 2018.

[13] At the time that the CBSA made the section 57 re-determinations, and at the time that the goods were imported, the then-current version of the CBSA's Memorandum D14-1-8, which had been in effect since 2015 (the 2015 Re-investigation Policy), provided that:

> 6. The new values will be effective for the subject goods released from customs on or after the date the re-investigation is concluded or the date of the decision letter to the exporter, whichever occurs first. Please refer to Memorandum D14-1-2 for information on the disclosure of values to importers.
>
> 7. Notwithstanding any other provisions in this policy, when there are changes to domestic prices, market conditions, costs associated with production and sales and/or subsidy levels, the onus is on the parties concerned to advise the CBSA in writing. Where substantial changes occur, and the CBSA is not advised in a timely manner, or the required information to make any necessary adjustments to values is not provided, retroactive assessments may be applied, where such action is warranted. In such circumstances, the only limitation to such retroactivity will be the statutory limitations within SIMA.[9]

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8 CBSA, *Certain Concrete Reinforcing Bar*, Notice of Conclusion of Re-investigation (4 May 2018), online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/rb1-22017/rb1-22017-nc-eng.html>.

9 Exhibit EA-2019-005-20 at 68.

[14] On September 26, 2018, Acierco filed four requests for re-determination with the CBSA under subsection 58(1.1) of SIMA.

[15] On July 19, 2019, the CBSA revised the 2015 Re-investigation Policy to include new factors that it would consider in determining whether retroactive assessments of duties should be issued for past importations (the 2019 Re-investigation Policy). It reads, in relevant part, as follows:

> 29. Exporters with normal values are required to promptly inform the CBSA in writing of changes to domestic prices, costs, market conditions or terms of sale associated with the production and sales of the goods. All parties are cautioned that where there are increases in domestic prices and/or costs as noted above, the export price for sales to Canada should be increased accordingly to ensure that any sale made to Canada is not only above the normal value but at or above selling prices and full costs and profit of the goods in the exporter's domestic market. If exporters did not properly notify the CBSA of any such changes, did not adjust export prices accordingly, or did not provide the information required to make any necessary adjustments to normal values and export prices, retroactive assessments of anti-dumping duties may be warranted. Exporters can provide this information to the CBSA using the "Making Representations" process outlined in paragraphs 8–11 in this Memorandum.
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> 30. When the CBSA conducts a re-investigation or normal value review, it will also do an analysis to determine whether retroactive duties should be assessed for past importations considering the following factors:
>
> - whether there were changes in market conditions, prices, costs and terms of sale that could reasonably be expected to have a significant impact on an exporter's normal values;
> - whether the exporter's domestic selling prices or costs of production increased during the period under consideration;
> - whether the exporter increased its export prices to Canada to take into account cost and price increases and whether this was done in a timely manner;
> - the difference between the new normal value and the actual export price of the goods; and
> - any other factors deemed relevant by the CBSA.
>
> 31. Where the CBSA's analysis determines that changes to market conditions caused normal values to become significantly outdated and that the exporter failed to price up its exports in a timely manner, the CBSA may issue retroactive assessments to the exporter's Canadian importers. This is based on the revised normal value compared to the actual export price. In determining what constitutes significantly outdated, the CBSA will conduct a contextual analysis, which will give due regard to the market conditions of a particular good.
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> 32. Retroactive duty assessments can be made for importations occurring from the start of the period of investigation covered by the re-investigation or normal value review until the conclusion of the re-investigation or normal value review.[10]

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[10] *Ibid.* at 74.

[16] On September 12, 2019, the President of the CBSA issued four decisions pursuant to section 59 of SIMA, maintaining the application of the NVs established at the conclusion of the third re-investigation. Therefore, no refund was issued to Acierco and no additional duties were owing.

[17] On November 13, 2019, Acierco filed a notice of appeal with the Tribunal pursuant to subsection 61(1) of SIMA. Acierco is seeking:

(1) a finding that the NVs determined after the goods were imported into Canada cannot be used to retroactively assess the subject goods punitively;

(2) a finding that the NVs existing at the time that the goods were imported are applicable to the goods;

(3) that the CBSA be estopped from issuing the retroactive assessment; and

(4) a refund of the AD duties assessed, with GST and interest.

[18] On January 13 and 21, 2020,[11] 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 threat of injury finding with respect to the subject goods.

[19] On January 15 and 27, 2020, Acierco requested that the Tribunal not grant either party intervener status because their requests were incomplete in that they did not satisfy the grounds under rule 40.1 of the *Canadian International Trade Tribunal Rules*[12] that are required to warrant an intervention. It also requested that, should the Tribunal grant intervener status to either party, it exercise its discretion to limit their roles.

[20] On January 17 and 24, 2020, the CBSA advised the Tribunal that it supported the proposed intervention of AMLPC and Gerdau.

[21] On January 23 and 31, 2020, AMLPC and Gerdau filed submissions in response to Acierco's submissions opposing their intervention.

[22] On February 6, 2020, the Tribunal granted AMLPC and Gerdau the status of interveners in this proceeding, as it was satisfied that they each had a direct and substantial interest in the outcome of the appeal, which may not otherwise have been adequately represented by the CBSA. The Tribunal did, however, direct AMLPC and Gerdau to limit their submissions and evidence to those which were relevant to the appeal and avoid broadening the scope of the appeal beyond what was contemplated in Acierco's notice of appeal and brief.

[23] Due to the COVID-19 pandemic, the Tribunal held a hearing by way of videoconference on September 8, 2020.

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11 Gerdau initially filed its request to intervene on January 21, 2020, but subsequently requested to file an amended version on January 24, 2020, which the Tribunal allowed on January 27, 2020.

12 SOR/91-499.

ANALYSIS

[24] There is no dispute between the parties that the imported goods are subject to the Tribunal's finding in *Rebar I*. There is also no dispute as to the manner in which the NVs were established during the CBSA's re-investigations or their quantum.

[25] This appeal raises a single issue, i.e. whether the NVs applicable to the imported goods should be those established for Çolakoğlu during the CBSA's third re-investigation, as determined by the President of the CBSA, or those established during the CBSA's first re-investigation, as claimed by Acierco.

[26] As the Tribunal noted in *Ferrostaal*,[13] the appellant bears the initial burden of establishing, on a *prima facie* basis, that re-determinations made by the President of the CBSA pursuant to section 59 of SIMA are invalid or incorrect.[14] Acierco has not met this burden for the reasons that follow.

The application by the President of the CBSA of the updated NVs established during the third re-investigation is in accordance with SIMA and CBSA policy

Positions of the parties

[27] Acierco submitted that the CBSA, and the Government of Canada more generally, have represented Canada's trade remedy system as prospective and that the CBSA has a long-established policy of interpreting SIMA by applying NVs prospectively.[15]

[28] Acierco admitted that the CBSA has the discretion to re-determine NVs retroactively, pursuant to section 57 of SIMA, but submitted that this is an exceptional punitive measure meant to address situations where exporters do not cooperate or withhold information from the CBSA. Acierco submitted that the CBSA constrained its discretion in the 2015 Re-investigation Policy and the 2019 Re-investigation Policy (the Re-investigation Policies) with regard to the application of retroactive assessments. In this regard, Acierco noted that the 2015 Re-investigation Policy—which applied at the time that it purchased and imported the subject goods and the CBSA made the section 57 re-determinations—provided that, where the CBSA was not advised in a timely manner of substantial changes, retroactive assessments may be applied.[16]

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13 *Ferrostaal Metals GmbH v. President of the Canada Border Services Agency* (2 July 2020), EA-2019-001 (CITT) [*Ferrostaal*] at para. 31.

14 See *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (29 October 2014), AP-2012-035 (CITT) [*Canadian Tire*] at paras. 37, 39; *Sugi Canada Ltée v. Deputy Minister of National Revenue for Customs and Excise* (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.

15 Acierco relies on the following: CBSA's Statement of Administrative Practices for the *Special Import Measures Act* at Part 11(B) [SIMA Statement], online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/ap-pa-eng.html>; WTO, Trade Policy Review, *Minutes of the Meeting* (August 20, 2015) – Advance written questions and additional questions by WTO Members, and replies provided by Canada at 8; Department of Finance, *Government Response to the Report on the Special Import Measures Act* [Government Response] online: <https://www.fin.gc.ca/toc/1997/sima-eng.asp>.

16 Exhibit EA-2019-005-20 at 68.

[29] Acierco further noted that the updated 2019 Re-investigation Policy removed this language, and now states that "[w]here the CBSA's analysis determines that changes to market conditions caused normal values to become significantly outdated and that the exporter failed to price up its exports in a timely manner, the CBSA may issue retroactive assessments to the exporter's Canadian importers." Acierco submitted that the unilateral emphasis on price and cost increases, and not decreases, almost certainly violates Canada's World Trade Organization (WTO) obligations under articles 2.1 and 9.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement).[17] Acierco also noted that the 2019 Re-investigation Policy now provides a list of factors to determine whether retroactive AD duties should be assessed, which it argued were issued not only for the benefit of the industry but also to constrain the CBSA's discretion in issuing retroactive assessments. However, Acierco submitted that these factors will only be considered in cases where exporters do not report changes to the CBSA as required.

[30] Although Acierco noted that the CBSA's Re-investigation Policies do not provide a binding outcome, Acierco submitted that these policies assist in providing predictability to importers and exporters by providing a structure within which the CBSA's discretion is exercised. According to Acierco, the presence of the phrase "where such action is warranted" in the 2015 Re-investigation Policy restrains the discretion of the CBSA and cautions that it should not apply retroactive assessments other than where it would be warranted.

[31] Acierco submitted that allowing the CBSA to apply retroactive assessments even where actors are complying with the letter of the law, the spirit of the law and the purpose of the law—which, according to Acierco, was the case here—undermines the notion that Canada operates a prospective NV system. According to Acierco, retroactive assessments have to be the exception to the rule, and a certain threshold should therefore be met before they are applied. Acierco submitted that, in this case, the test that the CBSA set out for itself to justify applying retroactive assessments was not met. Therefore, according to Acierco, the CBSA should not have applied NVs retroactively.

[32] Acierco further submitted that it was impossible for it to comply with the standard created by the CBSA, since the section 57 re-determinations were based on NVs which did not exist at the time that the imported goods were sold to Acierco.[18] According to Acierco, the imported goods should have been subject to the NVs established pursuant to the first re-investigation, as those were the ones in force at the time that the imports cleared Canadian customs.

[33] In addition, Acierco submitted that, even if the Tribunal accepts that the President of the CBSA is bound by law to apply the most recent NVs, the Tribunal is not similarly constrained,

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17 Online: <https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm>.

18 Acierco cites the decision of the Nova Scotia Provincial Court in *R. v. Canchem Inc.*, [1989] NSJ No 499 [*Canchem*] and the decision of the Tax Court of Canada in *Paquette v. Minister of National Revenue*, 1989 CarswellNat 475 [*Paquette*]. In *Canchem*, the Nova Scotia government ordered Canchem Inc. to clean a site within 30 days, which it was unable to do. The court found that, since the government revoked Canchem Inc.'s right to transport dangerous goods, it rendered it impossible for Canchem Inc. to comply with the government's order. The government could not therefore charge Canchem Inc. with failing to comply with the order. In *Paquette*, the court found that it was impossible for Mr. Paquette to know that certain provisions of the *Income Tax Act* would apply to him before he entered into a real estate transaction on September 3, 1986. It was not therefore possible for Mr. Paquette to pay instalments on March 15 and June 30, 1986, as prescribed by the *Income Tax Act*, but payment would only be required starting September 30, 1986.

because the Tribunal has wide latitude, under subsection 61(3) of SIMA, to grant the remedy that the nature of the matter may require.

[34] Finally, Acierco argued that the facts in *Ferrostaal* are distinguishable from those of the current case because, although both cases concern retroactive assessments, there was no evidence in *Ferrostaal* of correspondence between the exporter and the CBSA in accordance with the requirements of the Re-investigation Policies.

[35] For its part, the CBSA submitted that there is no basis under SIMA for the Tribunal to find that the CBSA incorrectly applied contemporaneous NVs or that the outdated NVs should be reinstated, as requested by Acierco. The CBSA submitted that prospective NVs issued to exporters are intended to assist the CBSA in its administration of SIMA and to provide guidance to exporters as to how future exports may be treated by the CBSA. They cannot displace the CBSA's statutory obligation to assess duties at the time of importation, impede the making of a re-determination, or prevent the CBSA from considering updated information that more accurately reflects the commercial conditions at the time that the transactions took place. The CBSA noted that, in *Canadian Tire*, the Tribunal concluded that the application of updated NVs in a section 59 re-determination was not "contrary to the clear wording of SIMA and its long-standing method of administering and enforcing duties."[19]

[36] Furthermore, the CBSA submitted that its decision to initiate a section 57 re-determination was in accordance with the broad discretion it is afforded under paragraph 57(b) of SIMA, which, in relevant part, allows a designated officer to re-determine NVs where the designated officer "deems it advisable" within two years after the determination under section 56 of SIMA. It submitted that the re-determination did not represent an arbitrary exercise of discretion, as it was issued to update NVs to reflect actual domestic selling prices where the CBSA was aware that there had been a significant change. The CBSA also submitted that the prospective elements of Canada's trade remedy regime do not limit the CBSA's ability to apply updated NVs in re-determinations pursuant to section 57 or 59, which are inherently retrospective in nature.

[37] The interveners largely took the same position as the CBSA and argued that the CBSA's policies are not instruments that limit or confer jurisdiction, nor are they legally enforceable.[20]

Analysis

[38] As stated in *Ferrostaal*,[21] 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 aggregate of the cost of production of the goods that are imported combined with a reasonable amount for administrative and selling costs, as well as all other costs, and a reasonable

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19 *Canadian Tire* at para. 80.

20 See, for example, *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII), [2014] 2 F.C.R. 557 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.

21 *Ferrostaal* at paras. 48–61.

amount for profits derived from the exporter's sales of like goods in its domestic market.[22] 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 when exporters do not cooperate with the CBSA in an investigation or re-investigation and usually results in a less favourable outcome.

[39] SIMA and its underlying international agreement, the 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.[23]

[40] In the duty assessment context, as noted by the Tribunal in *Canadian Tire* and *Ferrostaal*, 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.[24] As "margin of dumping" is defined as the amount by which the NV of the goods exceeds the export price of the goods,[25] on its face, this provision would appear to require that an NV be established and compared to the export price for every sale of subject goods into Canada. 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.

[41] 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 AD duty liability on importation into Canada.[26] Stated differently, AD 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 equal to 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 that are aware of duty liability.[27]

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22 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.

23 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.

24 *Canadian Tire* at para. 72; *Ferrostaal* at para. 43.

25 See subsection 2(1) of SIMA.

26 *Canadian Tire* at para. 75.

27 *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].

[42] 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 the subject goods are being dumped at higher margins than in the original investigation.

[43] To keep prospective NVs up to date to reflect current market conditions, the CBSA conducts re-investigations on a periodic basis.[28] 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.[29]

[44] 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 or in its regulations or any other law pertaining to customs matters.[30]

[45] Indeed, when subject goods are imported, subsection 56(1) of SIMA allows for a designated officer to make a determination of the NVs 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 an 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.

[46] Thus, by logical extension, any re-determinations of NVs made by a designated officer pursuant to section 57 of SIMA, or by the President of the CBSA pursuant to section 59, are also 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 elements such as NVs is retrospective in nature.[31]

[47] 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).[32] 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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28 These re-investigations are also conducted to update export prices and, where applicable, amounts of subsidy. See Exhibit EA-2019-005-20 at 67, 69.

29 *Canadian Tire* at footnote 4.

30 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 notes that re-investigations are not provided for by SIMA.

31 *Canadian Tire* at para. 76.

32 As noted by Parliament in the 1996 SIMA Review, the large volume of importations 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 was the case here with the goods imported by Acierco, unless they are based on incorrect information or unless exporters have not advised the CBSA of substantial changes to domestic prices, market conditions and costs of production and sales in a timely manner, importers can rest assured that the CBSA will not make a re-determination.[33]

[48] However, when the CBSA does make a re-determination, whether on its own initiative 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. 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.[34]

[49] At the hearing, Acierco argued that the right of appeal to the President of the CBSA is significantly narrowed and read down if the President has to apply the most recent NVs. It submitted that importers could never challenge the retroactive application of NVs if it meant that, by making a request for re-determination, the President was under a duty as per SIMA to apply the most recent NVs on a retroactive basis.[35] The Tribunal cannot accept this argument for the reasons already indicated. The powers of the President are circumscribed by SIMA; given the clear wording of the SIMA provisions discussed above, the President cannot ignore newer NVs in making its re-determination.

[50] In the present case, Acierco purchased and imported the goods between June and August 2017, and the NVs established by the CBSA during the third re-investigation were determined on the basis of information collected for the period from May 1 to October 31, 2017 (i.e. on the basis of information that was contemporaneous with the sale of the imported goods to Acierco). In contrast, the NVs established by the CBSA during the first re-investigation, which Acierco claims should apply, were determined on the basis of information collected for the period of January 1 to December 31, 2015. Accordingly, the Tribunal concludes that, when it made its re-determinations under section 59, the President of the CBSA correctly applied the third re-investigation's NVs to the imported goods.

[51] Moreover, the Tribunal notes that this conclusion is consistent with the CBSA's established practice, as reflected in the letters issued to importers and exporters at the initiation and conclusion of its re-investigations, as well as in Memoranda D14-1-8 and D14-1-3, which outline the circumstances in which NVs will be applied retroactively. Although Acierco claimed that the retroactive application of NVs is exceptional and intended to be punitive, it provided no evidence that the intent of the system was to punish importers and exporters that have withheld information from the CBSA or have failed to increase export prices in line with increases in domestic selling prices (i.e. selling prices in

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33 See Exhibit EA-2019-005-20 at 53, 68, 74.

34 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 that 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 AD duties "equal to" the margin of dumping.

35 *Transcript of Public Hearing* at 27–29.

the exporter's domestic market) and costs of production. As submitted by the CBSA, both Re-investigation Policies generally advise importers and exporters of the possibility of retroactive assessments in the context of a re-determination and do not circumscribe them to punitive situations. The Tribunal also notes that the Re-investigation Policies allow the CBSA to ensure that the amount of duties collected reflects whether the goods were actually sold at dumped prices, based on contemporaneous NVs.

[52] In any event, in each of its three re-investigations, including at the initiation of the second re-investigation shortly before the importation of the goods in issue, the CBSA advised importers and exporters that, "[w]here changes have occurred and the CBSA has not been advised in a timely manner, the extent of these changes could warrant retroactive assessments of anti-dumping or countervailing duties."[36] Acierco has provided no evidence that the CBSA was advised of changes in the Turkish rebar market in the timeframe relevant to the importations at issue.[37]

[53] The Tribunal further finds that the evidence clearly shows that the CBSA advised exporters and importers at the commencement of the second re-investigation, before the goods in issue were imported, that it believed it was *not* made aware of changes in the rebar market and that there was a potential for retroactive assessment.[38] The evidence also shows that Acierco nevertheless decided to import the goods.[39]

Questions of procedural fairness and equity are not relevant in this case

[54] Relying on the Federal Court of Appeal's decision in *Uniboard*,[40] Acierco submitted that procedural fairness is applicable to SIMA investigations. However, the Tribunal notes that *Uniboard* did not concern a decision of the Tribunal but rather stemmed from the judicial review of a decision by the President of the CBSA made under paragraphs 41(1)(a) and (b) of SIMA.

[55] As noted by the 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."[41]

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36 CBSA, *Certain Concrete Reinforcing Bar*, Notice of Conclusion of Re-investigation (29 June 2016), [*2016 Notice*] online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/ad1403/ad1403-ri16-nc-eng.html>; CBSA, *Certain Concrete Reinforcing Bar*, Notice of Conclusion of Re-investigation (1 September 2017), online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/rb2017/rb2017-nc-eng.html>; CBSA, *Certain Concrete Reinforcing Bar*, Notice of Conclusion of Re-investigation (4 May 2018), online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/rb1-22017/rb1-22017-nc-eng.html>; Exhibit EA-2019-005-20 at 40.

37 Acierco provided evidence of correspondence with the CBSA dating from 2015 regarding changes to the Turkish concrete reinforcing bar market, as well as communications between Çolakoğlu and the CBSA following the conclusion of the second re-investigation to provide data, some months after the importations at issue, on the Turkish concrete reinforcing bar market; Exhibit EA-2019-005-04D (protected) at 158–173.

38 Exhibit EA-2019-005-20 at 40–41, 44.

39 Exhibit EA-2019-005-51A (protected) at 4.

40 *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH & Co. KG*, 2006 FCA 398 at paras. 5–8 [*Uniboard*].

41 *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; *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 (CanLII) at para. 44.

[56] 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.[42] 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.[43]

[57] The Tribunal in *Robertson* 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."[44] 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."[45]

[58] Acierco submitted that, in this case, the procedural fairness arguments it raises directly relate to the CBSA's decision to initiate and issue the section 57 re-determinations and their basis. Acierco submitted that: (1) the CBSA's issuance of the section 57 re-determinations derogated from Canada's established prospective duty enforcement system without notice; (2) the CBSA failed to provide the affected importers and exporters with the appropriate procedural protections; (3) the CBSA breached Acierco's legitimate expectations regarding its administration of the prospective duty enforcement system; (4) the CBSA failed to provide Acierco or the Turkish exporters any right to present their case; and (5) the application of the 2019 Re-investigation Policy was an abuse of discretion and an excess of jurisdiction.

[59] Acierco submitted that the CBSA should be estopped from issuing the section 57 re-determinations with retroactive effect, as Acierco and Çolakoğlu relied on Canada's representations regarding its prospective duty enforcement system and on the CBSA's representations regarding re-investigations and retroactive AD duties in their commercial dealings.[46]

[60] The Tribunal finds that, in the present appeal, the procedural defects alleged by Acierco 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 from the CBSA's third re-investigation applied by the President of the CBSA. As such, it cannot be said that the questions of procedural fairness raised by Acierco inform in any way the Tribunal's approach with regard to the issue that is properly within its jurisdiction here. Ultimately, it is not the role of the Tribunal to comment on the content of the duty of procedural fairness owed to Acierco by the CBSA.

[61] The Tribunal is nevertheless of the view that, even if these questions of procedural fairness were within the Tribunal's purview, they would not affect the Tribunal's finding that the CBSA properly applied the NVs established following the third re-investigation. Indeed, for the reasons that

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42 *Toyota Tsusho* at para. 8.

43 *Ibid.* at para. 9.

44 *Robertson* at para. 13.

45 *Ibid.*

46 See, for example, Exhibit EA-2019-005-20 at 59–60; *2016 Notice*; SIMA Statement at Part 11(B); House of Commons, Standing Committee on Finance and Standing Committee on Foreign Affairs and International Trade, *Report on The Special Import Measures Act* (December 1996), Chapter IV (Co-Chairs: Ron Duhamel and Michel Dupuy), online: <http://www.ourcommons.ca/Content/Archives/Committee/352/sima/reports/01_1996-12/chap4-e.html>; Government Response; Exhibit EA-2019-005-04B at 26–34.

follow, the Tribunal is of the view that Acierco did not establish that the CBSA acted in a procedurally unfair manner.

The CBSA did not deviate from its established policies

[62] Acierco submitted that the CBSA deviated from its established policies when it decided to initiate and issue the section 57 re-determinations. According to Acierco, the CBSA breached the principles of natural justice when it retroactively placed the onus on importers and exporters to increase export prices above fixed prospective NVs without notifying them of this policy and interpretive change.

[63] Indeed, Acierco submitted that the 2019 Re-investigation Policy applied a new requirement that exporters disregard the prospective NVs assigned by the CBSA and instead self-adjust NVs without any guidance from the CBSA to ensure that export prices are above their ephemeral domestic market selling prices and full costs and profits, hoping that these self-adjusted NVs will be sufficient to avoid retroactive duty liability.[47]

[64] As indicated above, Acierco further submitted that the CBSA breached procedural fairness when it failed to provide notice to Acierco and Çolakoğlu of this change.[48] Acierco submitted that the CBSA would have had to provide sufficient notice to importers and exporters to allow them to organize their commercial affairs accordingly.[49] In support, Acierco noted the Federal Court of Appeal's decision in *Thamotharem*, which provided that certain documents, such as policy statements, "can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly".[50]

[65] The CBSA submitted that its policy with respect to the application of updated NVs did not change in any significant way in its 2019 Re-investigation Policy. The CBSA has long relied on exporters, importers and manufacturers to advise it of changes to domestic prices, costs, market conditions or terms of sale and has advised them through both policy and correspondence that, in the context of a re-determination under section 57 or 59 of SIMA, it may apply updated NVs based on the information collected in a re-investigation.[51]

[66] The 2015 Re-investigation Policy provided that "when there are changes to domestic prices, market conditions, costs associated with production and sales and/or subsidy levels, the onus is on the parties concerned to advise the CBSA in writing."[52] This policy also provided that retroactive assessments may be applied where substantial changes occur and "the CBSA is not advised in a timely manner, or the required information to make any necessary adjustments is not provided".[53] It

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47 Exhibit EA-2019-005-20 at 68.

48 Acierco submitted that, although the CBSA made an announcement on June 14, 2018, regarding its NV review process, the announcement did not include any details regarding the proposed review of NVs; see CBSA, "New Normal Value Review Process" (14 June 2018), online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/nvrp-prvn-eng.html>.

49 Acierco noted, for example, that the CBSA usually announces consultations on proposed regulatory amendments.

50 *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 (CanLII), [2008] 1 FCR 385 [*Thamotharem*] at para. 55.

51 See, for example, Exhibit EA-2019-005-20A (protected) at 41, 49–56.

52 Exhibit EA-2019-005-20 at 68.

53 *Ibid.*

also indicated that reassessed NVs may be applied to requests for re-determination that have not yet been processed by the CBSA, potentially resulting in additional AD duties or a refund thereof.[54]

[67] According to the CBSA, the 2019 Re-investigation Policy does not alter the CBSA's application of retroactive assessments or change the onus on exporters, importers and manufacturers to advise the CBSA of changes to domestic prices, costs, market conditions or terms of sale.

[68] The Tribunal agrees with the CBSA and finds that the CBSA has not deviated from its established policies. Acierco's submission that there is a new requirement for parties to ignore established NVs and simply self-adjust them is misconstrued. The evidence shows that Acierco and Çolakoğlu were aware, well before the adoption of the 2019 Re-investigation Policy, of their responsibility to advise the CBSA of any relevant changes, as well as of the possibility of retroactive assessments stemming from such changes.[55] The 2019 Re-investigation Policy simply further cautions that, where there are increases in domestic prices and/or costs, the export price should be increased accordingly to avoid retroactive assessments potentially resulting in additional AD duties. Effectively, the CBSA thereby simply spelled out an option that would always have been open to importers and exporters engaged in importing goods into Canada subject to SIMA duties and seeking to minimize the likelihood of any outstanding AD duty liability owing in a situation of rising prices or costs in the exporter's home market.

[69] Finally, the Tribunal notes that, although *Thamotharem* provided that documents such as the Re-investigation Policies can help the public anticipate an agency's application of its discretion and structure its affairs, the Federal Court of Appeal also held that, while guidelines or policy statements structure the exercise of statutory discretion to enhance consistency, they do not fetter a decision-maker's exercise of discretion.[56]

There is no evidence of a requirement for specific procedural protections

[70] Acierco submitted that retrospective duty enforcement systems have procedural mechanisms to ensure fair final assessments, as well as some measure of predictability. These mechanisms include posting security for duties as an indication of liability, using an administrative review process to determine final duty liability, and providing a process where importers and exporters have participatory rights. According to Acierco, the CBSA denied Acierco procedural fairness by failing to provide it with such procedural protections and denying it the opportunity to present its case before applying retroactive assessments.

[71] Although retrospective systems elsewhere in the world may provide specific mechanisms such as those cited by Acierco, Acierco has provided no evidence that the lack thereof would amount to a denial of procedural fairness or breach of natural justice. The Tribunal sees no basis to find that Acierco was denied proper procedural protections in this case.

The CBSA did not breach Acierco's legitimate expectations

[72] Acierco submitted that, through consistent representations, the CBSA created the legitimate expectation that it would only apply AD duties retroactively in exceptional circumstances, that is,

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54 *Ibid.*

55 Exhibit EA-2019-005-20A (protected) at paras. 42–43, at 46–53; *Transcript of Public Hearing* at 23–24.

56 *Thamotharem* at paras. 59, 62.

where it was not advised of changes in market conditions in a timely manner as provided in the Re-investigation Policies, which Acierco claims was not the case here.[57]

[73] Acierco submitted that it acted in good faith and in accordance with the CBSA's published guidance when it purchased the imported goods at prices well above the prospective NVs established by the CBSA in the first re-investigation. Acierco also noted that the CBSA had never issued retroactive assessments for Turkish rebar it had purchased, again at prices above the established NVs. Furthermore, Acierco submitted that it relied on the NVs in place to negotiate the sales agreements for the imported goods and that the importations occurred some 11 months prior to the issuance of the retroactive assessments. Acierco therefore submitted that it legitimately expected that the NVs established in the first re-investigation would apply to the imported goods, as they applied at the time that the imported goods were sold to Acierco and at the time that they cleared customs.

[74] The Tribunal notes that, in *Agraira*, which was cited by Acierco, the Supreme Court of Canada acknowledges that the doctrine of legitimate expectations does not give rise to substantive rights, only the granting of appropriate procedural remedies.[58] Therefore, similar to what the Tribunal stated in *Ferrostaal*, even if the CBSA had created any legitimate expectation in regards to the retroactive application of AD duties, this would only result in the requirement that it provide Acierco with a greater degree of procedural fairness.[59]

[75] Furthermore, the Federal Court of Appeal in *Honey Fashions* found that the CBSA must be able to exercise its discretion but that like cases must be treated alike.[60] Citing *Vavilov*, the Federal Court of Appeal noted that administrative decision makers are not bound by internal precedent in the same manner as courts and that departure from long-standing practice will be reasonable if justified.[61]

[76] However, similarly to *Ferrostaal*, given the Tribunal's conclusion that the application by the President of the CBSA of updated NVs to the imported goods was in accordance with SIMA and the CBSA's own policies, Acierco's claim that the CBSA created any legitimate expectation is entirely unfounded.[62]

The CBSA provided Acierco with an opportunity to present its case

[77] Acierco submitted that it was not provided notice of the section 57 re-determinations and that it did not have a meaningful opportunity to present its case before the retroactive assessments were applied.[63]

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57 Acierco 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.

58 *Agraira* at para. 97. See also *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64 (CanLII) [*Honey Fashions*] at para. 50.

59 *Ferrostaal* at para. 79.

60 *Honey Fashions* at para. 38.

61 *Ibid.* at para. 39, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*] at para. 131.

62 *Ferrostaal* at para. 80.

63 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 32.

[78] The Tribunal finds that the CBSA acted in accordance with paragraph 57(b) of SIMA, which allows for a designated officer to issue a re-determination where it "deems it advisable". SIMA does not require that the importer be provided with advance notice of the designated officer's intention to issue the re-determination. Further, Acierco was provided the opportunity to present its case when it proceeded with its section 58 request for re-determination.

There was no abuse of discretion or excess of jurisdiction

[79] Acierco first submitted that the CBSA abused its discretion by failing to consider relevant information that would have allowed it to conclude that retroactive assessments were not proper in the current case.[64]

[80] The Tribunal notes, however, that the information referred to by Acierco is dated prior to the first re-investigation and was not relevant to the CBSA's decision to issue retroactive assessments in 2018. Furthermore, it relies on the premise that retroactive assessments are an entirely punitive measure, which the Tribunal has rejected above.

[81] Acierco also submitted that the CBSA applied an improper retroactive action in that it applied the requirement from the 2019 Re-investigation Policy that importers and exporters self-adjust export prices upwards to importations that occurred in 2017.[65] According to Acierco, this was unreasonable, as the policy changes were only communicated to the public in 2019.

[82] In addition, Acierco submitted that the CBSA's requirement for importers and exporters to self-adjust NVs represents an excess of jurisdiction; as the CBSA has the authority under SIMA to determine NVs, it is contrary to that authority for the CBSA to require exporters to self-adjust their NVs.[66]

[83] However, as noted above, the CBSA's 2019 Re-investigation Policy did not impose any such new requirement, but only cautioned importers and exporters that export prices should be increased where there are increases in domestic prices and/or costs to avoid potential additional AD duties in case of a re-assessment. Therefore, the Tribunal finds that the CBSA did not act in an improper manner or in excess of its jurisdiction.

[84] Finally, Acierco submitted that NVs are confidential to the exporters and to the CBSA and that their disclosure is prohibited.[67] In addition, Acierco does not have access to exporters' confidential cost information. Therefore, it is not possible for Acierco to know whether the prices of goods it is purchasing are above or below any applicable NVs. Acierco again submitted that it cannot be held to the impossible and that the Re-investigation Policies cannot be interpreted as putting the onus on Acierco to advise the CBSA of changes in domestic prices, market conditions, costs of production, sales or subsidy levels, as Acierco does not have access to this information.[68]

[85] It is true that the CBSA considers NVs to be confidential information belonging to exporters and will not disclose them. However, Memorandum D14-1-2, cited by Acierco, recognizes that

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64 *Shell Canada Ltd. v. Canada (Attorney General)*, 1998 CanLII 9050 (FC), [1998] 3 FC 233 at para. 27.

65 *Ibid.*

66 Acierco relied on sections 15 to 23.1 and 30 of SIMA.

67 In support of this proposition, Acierco relied on Memorandum D14-1-2 (Exhibit EA-2019-005-23 at 20–21), section 84 of SIMA, and section 107 of the *Customs Act*.

68 *Canchem* at para. 24.

exporters are free to disclose this information to importers in the course of their business dealings and in fact would have to do so in order for the importer to be able to self-assess the amount of SIMA duties owing at importation.[69]

[86] Further, the onus under the Re-investigation Policies is on all parties, not just on importers, to notify the CBSA of changes. If Acierco and Çolakoğlu are in a long-term commercial relationship, then it is not unreasonable to expect that Çolakoğlu would have an interest in ensuring that Acierco faces limited duty liability, to preserve the relationship, and would advise Acierco of changes to its costs or increase prices accordingly. In fact, there is evidence on the record that Acierco and Çolakoğlu had corresponded on the subject of NVs prior to the importation of the goods in issue.[70]

[87] Ultimately, SIMA imposes duty liability on importers, and it is up to them to conduct their commercial affairs accordingly. It is the responsibility of the importers to seek out information regarding potential changes in NVs from exporters.

DECISION

[88] The appeal is dismissed.

Serge Fréchette

Serge Fréchette
Presiding Member

69 Exhibit EA-2019-005-23 at 20–21.
70 Exhibit EA-2019-005-51A (protected) at 4.