Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals EA-2019-008 and EA-2019-010

Hyundai Canada Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued
Thursday, May 12, 2022

Corrigendum issued
Wednesday, June, 14, 2023

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IN THE MATTER OF appeals heard on November 25 and 26, 2020, pursuant to section 61 of the *Special Import Measures Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated September 20, 2019, November 5, 2019, and December 2, 2019, with respect to re-determinations made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

HYUNDAI CANADA INC. **Appellant**

AND

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

DECISION

The appeals are allowed in part. The Canadian International Trade Tribunal remands the President's decision in each appeal back to the Canada Border Services Agency for reconsideration.

Serge Fréchette

Serge Fréchette
Presiding Member

IN THE MATTER OF appeals heard on November 25 and 26, 2020, pursuant to section 61 of the *Special Import Measures Act*;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated September 20, 2019, November 5, 2019, and December 2, 2019, with respect to re-determinations made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

HYUNDAI CANADA INC. **Appellant**

AND

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

CORRIGENDUM

Paragraph 9 should read as follows:

On August 7, 2019, the CBSA informed Hyundai Canada that it had completed its calculation of the applicable retroactive duties and that the retroactive assessments of anti-dumping duties would be applied on sales of dumped goods that occurred within the previous two years (i.e. on or after July 25, 2017).

[Footnote omitted]

The first sentence of paragraph 71 should read as follows:

It seems plain that the purpose of constructing export prices under section 25 of SIMA is to account for situations where the actual price between the exporter and the importer does not reflect normal commercial considerations, including but not limited to circumstances where the sale is between associated parties and therefore may be unreliable.

The first sentence of paragraph 95 should read as follows:

This aspect of the present appeals is concerned with the value of services purchased separately from the transformer and with whether such value should be part of the "price for which the goods were sold" by the importer under paragraph 25(1)(d) of SIMA.

[Footnote omitted]

The last sentence of the quote at paragraph 98 should read as follows:

However, facts relating to the amount for profit calculation and specifically whether the amount for profit deducted includes profits earned on Services performed in connection with the resale of transformers are relevant to determining whether the President improperly deducted profits from the Appellants [*sic*] Paragraph 25(1)(d) export prices.

[Footnote omitted]

By order of the Tribunal,

Serge Fréchette

Serge Fréchette
Presiding Member

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	November 25 and 26, 2020
Tribunal Panel:	Serge Fréchette, Presiding Member
Tribunal Secretariat Staff:	Peter Jarosz, Counsel Kalyn Eadie, Counsel Isaac Turner, Counsel Stephanie Blondeau, Registrar Officer

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STATEMENT OF REASONS

SUMMARY

[1] These are appeals filed by Hyundai Canada Inc. (Hyundai Canada) from re-determinations of anti-dumping duties made by the President of the Canada Border Services Agency (CBSA). These appeals have proceeded concurrently with a related appeal filed by Remington Sales Co. d.b.a. Hyundai Heavy Industries (Canada).[1]

[2] Hyundai Canada imports power transformers produced in the Republic of Korea (Korea) by an associated party, Hyundai Electric & Energy Systems (Hyundai Electric), for resale to unrelated purchasers in Canada. An assessment of anti-dumping duties under the *Special Import Measures Act* (SIMA) was made on these importations, based on a comparison of their export prices and normal values; Hyundai Canada disputes the CBSA re-determinations regarding the export prices of the importations at issue.

[3] Hyundai Canada appeals on the basis that the President of the CBSA erred in the re-determinations of export prices under sections 24 and 25 of SIMA, specifically with respect to the following:

(i) the reliability of export prices determined under section 24; and

(ii) the deductions made in re-determining export prices under sections 24 and 25.

[4] For the reasons below, the Tribunal concludes that the President of the CBSA erred in the re-determinations of export prices and remands the President's decisions back to the CBSA for reconsideration.

PROCEDURAL BACKGROUND

[5] On October 22, 2012, the President of the CBSA made a final determination of dumping pursuant to subsection 41(1)(a) of SIMA respecting liquid dielectric transformers (power transformers) having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete, originating in or exported from Korea.

[6] On November 20, 2012, the Tribunal made a finding that the dumping had caused injury to the domestic industry.[2]

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1 See EA-2019-009.

2 See *Liquid Dielectric Transformers* (20 November 2012), NQ-2012-001 (CITT). On November 21, 2012, an application for judicial review of the CBSA's final determination of dumping was made to the Federal Court of Appeal (FCA) by Hyundai Heavy Industries. On December 6, 2013, the FCA set aside the CBSA's final determination and referred the matter back to the President of the CBSA for reconsideration in accordance with the FCA's reasons. On March 6, 2014, the President made a new final determination pursuant to paragraph 41.1(1)(a) of SIMA. On May 31, 2016, the Tribunal decided, in the context of an interim review being held to determine whether its previous finding was impacted by the new final determination of dumping, to continue its finding that the dumping had caused injury to the domestic industry without amendment.

[7] On November 15, 2018, the CBSA initiated a normal value and export price review to update the normal values and export prices applicable to power transformers exported from Korea to Canada by Hyundai Electric. The period of investigation was from November 1, 2016, to October 31, 2018.[3]

[8] On July 25, 2019, the CBSA concluded its normal value and export price review. As part of this review, the CBSA determined that Hyundai Canada is related to Hyundai Electric, in accordance with the definition of "related" set out in subsection 2(3) of SIMA, and that they are therefore associated persons for the purposes of paragraph 25(1)(b). As a result, the CBSA carried out a "reliability test" and found that the prices of power transformers exported from Hyundai Electric to Hyundai Canada were not reliable. Consequently, Hyundai Canada was advised that all export prices of the subject power transformers for any possible future importations would be determined pursuant to paragraph 25(1)(d). The CBSA specified that these revised parameters were effective for goods released on or after July 25, 2019.[4]

[9] On August 7, 2019, the CBSA informed Hyundai Canada that it had completed its calculation of the applicable retroactive duties and that the retroactive assessments of anti-dumping duties would be applied on sales of dumped goods that occurred within the previous two years (i.e. on or after July 25, 2017).[5]

[10] On September 20, November 5 and December 2, 2019, pursuant to section 59 of SIMA, the President of the CBSA retroactively reassessed the anti-dumping duties payable on power transformers imported by Hyundai Canada on or after July 25, 2017.[6]

[11] On December 17, 2019 (EA-2019-008), and February 7, 2020 (EA-2019-010), Hyundai Canada filed appeals with the Tribunal in accordance with section 61 of SIMA.

[12] On February 17, 2020, the Tribunal granted the request of the parties, dated February 13, 2020, to combine appeals EA-2019-008 and EA-2019-010, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules* (Rules).[7]

[13] On March 23, 2020, ABB Power Grids Canada Inc. (ABB) requested to participate as an intervener.[8] On March 26, 2020, the CBSA advised the Tribunal that it agreed that ABB should be granted intervener status in the proceeding.[9] On March 30, 2020, Hyundai Canada requested that the Tribunal not grant ABB intervener status, because ABB's request to intervene lacked the specificity required to allow the Tribunal to assess whether ABB's intervention satisfied the mandatory requirements set out in section 40.1 of the Rules. It also requested that, should the Tribunal choose to grant intervener status to ABB, it limit ABB's intervener rights to filing a written case brief.[10] On April 2, 2020, the Tribunal granted ABB intervener status in this proceeding, as it was satisfied that it had a direct and substantial interest in the appeals. The Tribunal did, however, direct ABB to limit its submissions and evidence to those which were relevant to the appeals and to avoid broadening the scope of the appeals beyond that which was contemplated in Hyundai Canada's notices of appeal.[11]

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3 Exhibit EA-2019-008-07A at 6, 8.
4 Exhibit EA-2019-008-07E (protected) at 1752–1753, 1758–1759.
5 *Ibid.* at 1764–1765.
6 *Ibid.* at 1784–1837, 1899–1902.
7 Exhibit EA-2019-008-06.
8 Exhibit EA-2019-008-10.
9 Exhibit EA-2019-008-12.
10 Exhibit EA-2019-008-13.
11 Exhibit EA-2019-008-14.

[14] On June 2, 2020, the Tribunal informed the parties that, due to the situation concerning COVID-19, the hearing, which was to take place on July 22, 2020, was cancelled and would be rescheduled at a later date.[12]

[15] On June 3, 2020, the Tribunal requested additional submissions from the parties regarding the correct export prices for the importations in question and the appropriate methodology to establish those prices.[13] Submissions were received on July 3, 2020, and reply submissions, on August 24, 2020.

[16] On August 31, 2020, the Tribunal informed the parties that the hearing would proceed by way of videoconference and asked that parties select a mutually agreed date.[14]

[17] The Tribunal held a public videoconference and an *in camera* teleconference hearing on November 25 and 26, 2020.

LEGAL AND POLICY FRAMEWORK

[18] Anti-dumping duties are calculated by comparing the normal value (the selling price in the exporter's home market or a constructed profitable selling price) with the export price of the goods in issue. If the export price is lower than the normal value, the goods are dumped and the difference between the two represents the quantum of duties payable.

[19] Export prices can be determined under section 24 or, in certain cases, section 25 of SIMA.

[20] Where an export price is determined under section 24, it is simply the price as agreed upon by the importer and the exporter, with certain adjustments to remove exportation- and importation-related deductions. Section 24 provides as follows:

> **24** The export price of goods sold to an importer in Canada, notwithstanding any invoice or affidavit to the contrary, is *an amount equal to the lesser of*
>
> **(a)** *the exporter's sale price for the goods*, adjusted by deducting therefrom
>
> **(i)** the costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export,
>
> **(ii)** any duty or tax imposed on the goods by or pursuant to a law of Canada or of a province, to the extent that the duty or tax is paid by or on behalf or at the request of the exporter, and
>
> **(iii)** all other costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a), and

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12 Exhibit EA-2019-008-20.
13 Exhibit EA-2019-008-21.
14 Exhibit EA-2019-008-41.

> **(b)** *the price at which the importer has purchased or agreed to purchase the goods*, adjusted by deducting therefrom all costs, charges, expenses, duties and taxes described in subparagraphs (a)(i) to (iii).
>
> [Emphasis added]

[21] However, in certain cases, section 25 is used to determine the export price. In those cases, the export price is based on the importer's price of the goods sold to an unrelated purchaser in Canada, with the same adjustments as are made under section 24. In addition, the importer's costs associated with selling the goods and an amount for profit are also deducted from the price. Specifically, section 25 provides as follows:

> **25 (1)** Where, in respect of goods sold to an importer in Canada,
>
> **(a)** there is no exporter's sale price or no price at which the importer in Canada has purchased or agreed to purchase the goods, or
>
> **(b)** *the President is of the opinion that the export price, as determined under section 24, is unreliable*
>
> **(i)** *by reason that the sale of the goods for export to Canada was a sale between associated persons*, or
>
> **(ii)** by reason of a compensatory arrangement, made between any two or more of the following, namely, the manufacturer, producer, vendor, exporter, importer in Canada, subsequent purchaser and any other person, that directly or indirectly affects or relates to
>
> **(A)** the price of the goods,
>
> **(B)** the sale of the goods,
>
> **(C)** the net return to the manufacturer, producer, vendor or exporter of the goods, or
>
> **(D)** the net cost to the importer of the goods,
>
> the export price of the goods is
>
> **(c)** if the goods were sold by the importer in the condition in which they were or are to be imported to a person with whom, at the time of the sale, he was not associated, the price for which the goods were so sold less an amount equal to the aggregate of
>
> **(i)** all costs, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,
>
> **(A)** incurred on or after the importation of the goods and on or before their sale by the importer, or
>
> **(B)** resulting from their sale by the importer,

> **(ii)** an amount for profit by the importer on the sale,
>
> **(iii)** the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and
>
> **(iv)** all other costs, charges and expenses incurred by the exporter, importer or any other person resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a),

(d) if the goods are imported for the purpose of assembly, packaging or other further manufacture in Canada or for incorporation into other goods in the course of manufacture or production in Canada**,** *the price of the goods as assembled*, packaged or otherwise further manufactured, or of the goods into which the imported goods have been incorporated, *when sold to a person with whom the vendor is not associated at the time of the sale, less an amount equal to the aggregate of*

> **(i)** an amount for profit on the sale of the assembled, packaged or otherwise further manufactured goods or of the goods into which the imported goods have been incorporated,
>
> **(ii)** the administrative, selling and all other costs incurred in selling the goods described in subparagraph (i),
>
> **(iii)** the costs that are attributable or in any manner related to the assembly, packaging or other further manufacture or to the manufacture or production of the goods into which the imported goods have been incorporated,
>
> **(iv)** the costs, charges and expenses incurred by the exporter, importer or any other person in preparing the imported goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export, and
>
> **(v)** all other costs, charges and expenses, including duties imposed by virtue of this Act or the *Customs Tariff* and taxes,
>
> > **(A)** resulting from the exportation of the imported goods, or arising from their shipment, from the place described in paragraph 15(e) or the place substituted therefor by virtue of paragraph 16(1)(a) that are incurred by the exporter, importer or any other person, or
> >
> > **(B)** incurred on or after the importation of the imported goods and on or before the sale of the goods as assembled, packaged or otherwise further manufactured or of the goods into which the imported goods have been incorporated, or

(e) in any cases not provided for by paragraphs (c) and (d), the price determined in such manner as the Minister specifies.

> **(2)** No deduction for duties imposed by virtue of this Act may be made under
>
> > **(a)** subparagraph (1)(c)(i), in the case of an export price determined under paragraph (1)(c), or
> >
> > **(b)** subparagraph (1)(d)(v), in the case of an export price determined under paragraph (1)(d),
>
> where, in the opinion of the President, the export price determined under either of those paragraphs without making such a deduction is equal to or greater than the normal value of the goods.
>
> [Emphasis added]

[22] In these appeals, the relevant situation is that in which the export price may be determined under section 25 (section 25 export price) where the President of the CBSA is of the opinion that the export price determined under section 24 (section 24 export price) is "unreliable" by reason that the sale of the good for export to Canada was a sale between associated persons.

[23] SIMA does not define the term "unreliable". The CBSA has adopted a procedure, called the "reliability test", which it describes in the SIMA Handbook as the "usual 'tool' used to help the President form an opinion as to whether export prices determined under section 24 are unreliable, as envisaged by SIMA".[15] To perform the reliability test, the CBSA will select a representative sample of transactions and perform the export price calculation using the methodology of section 24 and then using the methodology of section 25 and compare the two results. If the section 25 export price is equal to or greater than the section 24 export price in 80 percent or more of the sample transactions, measured by volume or value as appropriate, then the section 24 export price will normally be considered reliable. Conversely, if the section 25 export price is lower than the section 24 export price in more than 20 percent of the sample transactions, then the section 24 export price will usually be considered unreliable, and section 25 will be used to determine export prices for that exporter. The SIMA Handbook provides for certain exceptions, which are discussed further below.

[24] The aim of the calculations under both sections 24 and 25 is to arrive at an ex-factory price for the goods. Thus, section 24 dictates that all costs, charges, expenses, etc. that are associated with selling the goods to an importer in Canada are deducted from the price charged by the exporter to the importer. Under section 25, all additional costs, etc. that are associated with the resale, as well as an amount for profit, are also deducted. However, pursuant to sections 20 to 22 of the *Special Import Measures Regulations* (Regulations), the amount for profit that is to be deducted from the importer's resale price in the section 25 calculation is not the amount for profit actually realized by the importer on the sale but an amount representative of the average industry profit in Canada. Ultimately, this means that what the reliability test measures is whether the importer is actually obtaining an amount for profit that is less than the average industry amount on more than 20 percent of the sales in the sample. The CBSA refers to this situation as "hidden" or "secondary dumping". According to the CBSA:

> A primary objective of section 25 of the Act is to ensure that the protection intended by a dumping action is not jeopardized due to related exporters and importers, intentionally or

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15 Exhibit EA-2019-008-07B at 1313.

> otherwise, in some way absorbing the impact of the anti-dumping action. In such cases, section 25 ensures that the resale price in Canada of the imported product increases to eliminate the injurious effect on Canadian producers.[16]

[25] It must be noted that the application of section 25 can result in more than just a change in the quantum of export prices. A section 25 export price can be higher or lower than, or equal to, a section 24 export price, but there are other significant consequences. The SIMA Handbook describes these consequences as follows:

> It is important to note that notwithstanding the preceding paragraph, subsection 25(2) of SIMA stipulates that no deduction for SIMA duties may be made where, in the opinion of the President, the export price determined under either paragraph 25(1)(c) or (d) without making such a deduction is equal to or greater than the normal value of the goods. Therefore, after the reliability test has been conducted and it is determined that export prices must be determined under section 25, the section 25 export price must be compared to the normal value to see whether there is any dumping before a deduction is made for SIMA duties. If there is no dumping, the exercise is concluded at that point. *If dumping is found, however, then SIMA duties previously paid or payable are deducted. The resulting lower section 25 export price is compared to the normal value to determine the margin of dumping and the final amount of SIMA duties to be paid.*
>
> As already noted earlier, the SIMA duties are never deducted when performing the reliability test calculation.[17]
>
> [Emphasis added]

[26] Therefore, the issue of whether section 24 or section 25 is applied to determine export prices can have far-reaching consequences over and above their quantum, and the choice of the section to be applied must be made correctly even if there is no difference in quantum of the export price under either section.

POSITIONS OF THE PARTIES

Hyundai Canada

[27] Hyundai Canada submitted that the President of the CBSA erred in the re-determinations of anti-dumping duties by concluding incorrectly that Hyundai Canada's export prices determined under section 24 of SIMA were unreliable.

[28] Hyundai Canada argued that the test used by the CBSA to determine reliability fetters the President's discretion and confuses the outcome of a reliability finding with a measure of reliability.

[29] Hyundai Canada argued that the test, as applied, measures an importer's resale profitability against the amount for profit determined under subparagraph 25(1)(d)(i) of SIMA rather than the "reliability" of the section 24 export price. Hyundai Canada argued that this test is based on factors that are irrelevant or beyond the President's mandate to consider and resulted in the President forming an opinion that is neither fair nor impartial.

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16 *Ibid.*

17 *Ibid.* at 1324.

[30] Hyundai Canada also argued that, in the event that the Tribunal accepted the President's reliability test as applied, the President improperly formed the opinion that Hyundai Canada's export prices failed the test. It submitted that the CBSA should have assessed the difference between the section 24 and section 25 export prices in light of the total value of the sample as opposed to the volume and that a value assessment would produce a "diametrically opposite" result to the volume analysis. Hyundai Canada argued that value is the appropriate method to determine reliability in this case, because power transformers are custom-made goods and their selling prices vary depending on the matrix of various customizable specifications that can be selected by a purchaser.

[31] Hyundai Canada also submitted that the President made incorrect deductions in re-determining export prices under section 25 of SIMA. Regarding these, Hyundai Canada made several arguments.

[32] First, Hyundai Canada argued that the deduction of service revenues was incorrect, because paragraph 25(1)(d) of SIMA requires the deduction of an amount for profit and the importer's expenses (i.e. direct expenses and indirect selling expenses) in selling an assembled good, not the deduction of revenue.

[33] Second, Hyundai Canada argued that (although it did not contest, in and of itself, the amount for profit used by the CBSA), there is an "obvious mismatch" when service revenues are deducted in the paragraph 25(1)(d) calculation, but the amount for profit calculation is based on manufacturing profits which include service revenues.

[34] Third, Hyundai Canada argued that the CBSA has an unfair policy of selecting the higher of service expenses or revenues to deduct (referred to as the "higher-of rule") for the purpose of depressing the section 25 export price.

[35] Fourth, Hyundai Canada argues that the expenses deducted should be those incurred by the importer and not third-party expenses, because the paragraph 25(1)(d) calculation is intended to be an estimate of what the importer would have paid for the goods.

[36] Fifth, Hyundai Canada argued that, like the practice of selecting the higher of service expenses or revenues to deduct discussed above, the CBSA also has an unfair policy of selecting the higher of third-party expenses or revenues to deduct.

[37] Hyundai Canada argued that, taken together, the correction of these errors would result in a finding that its section 24 export prices were reliable.

[38] In addition, Hyundai Canada argued that the deduction of service revenues was procedurally and substantively unfair and contrary to natural justice, because the CBSA had informed it in a previous proceeding that the President had deducted, and would deduct, expenses from the paragraph 25(1)(d) export price. These procedural errors were not raised as a distinct ground of appeal but instead were presented as being relevant insofar as they related to substantive legal errors that were made.

CBSA

[39] The CBSA argued that the President properly exercised his discretion in finding that the section 24 export prices were unreliable. The CBSA argued that SIMA does not explicitly define or limit what is meant by "unreliable" and that Parliament has expressly conferred broad discretion on the President to determine whether section 24 export prices are reliable. Further, the CBSA argued that the reliability test allows importers an opportunity to show that their section 24 export prices are reliable, despite the fact that the parties to the sale are associated, and it ensures that the formation of the President's opinion is facts-based, transparent and consistent.

[40] The CBSA argued that the reliability of section 24 export prices can only be determined when the section 24 and section 25 export prices are compared, because the mischief that the reliability investigation is trying to uncover (i.e. hidden or secondary dumping) will only be apparent upon consideration of the importer's resale price of the goods in Canada. The CBSA further argued, in response to Hyundai Canada's argument that the sample should have been assessed based on the difference in total value, that this is not how the reliability test works. The CBSA argued that the reliability test does not measure how much lower the section 25 export prices are than the section 24 export prices but rather the frequency with which the section 25 export prices are lower than the section 24 export prices.

[41] The CBSA further argued that the President did not err by excluding revenues for non-subject services in calculating the section 25 export prices. The CBSA argues that Hyundai Canada's argument that expenses should have been deducted rather than revenues shows that Hyundai Canada misunderstood the President's calculations; the President did not deduct revenues or expenses from the non-subject services but rather eliminated the prices charged for the non-subject services from the extended selling price so that the starting point of the section 25 calculation reflected the actual selling price of the transformers.

[42] The CBSA likewise argued that the President did not err by deducting third-party expenses in calculating section 24 and section 25 export prices. For the section 24 calculation, the CBSA argued that the purpose of the deductions is to remove the costs associated with the movement and exportation of the subject goods to arrive at an ex-factory selling price that can be compared to normal values and that the wording of SIMA does not limit these deductions to those costs that were incurred by the importer. For the section 25 calculation, the CBSA argued that there was no merit to Hyundai Canada's submission that the explicit reference to "exporter, importer, or any other person" should not apply to this scenario and that only costs directly incurred by the importer should be deducted. To this point, the CBSA adds that, given that the parties are related, the President had to account for the costs incurred by all three parties to ensure that anti-dumping measures were not being circumvented through the related-party transactions.

[43] Regarding the allegations that the deduction of service revenues was procedurally and substantively unfair, the CBSA argued that there is no merit to Hyundai Canada's argument and, in any case, the Tribunal has consistently held that it lacks jurisdiction to determine appeals on grounds of procedural fairness or natural justice.

ABB

[44] ABB submitted that the correct provision of SIMA for determining export prices in this case is paragraph 25(1)(c) rather than paragraph 25(1)(d), because the goods were sold "in the condition in which they were or are to be imported" (i.e. unassembled) rather than "for the purpose of assembly". ABB acknowledged that the mathematical application of that provision would result in the same export prices and conclusions on reliability determined by the CBSA and, in essence, already reflects the approach taken by the CBSA.

[45] ABB argued that SIMA grants the President wide discretion in determining reliability and that neither SIMA nor the Regulations specify the manner in which the President is to form his opinion of reliability. ABB argued that there is no principled reason to accept the "value test" proposed by Hyundai Canada and that the volume-based test used by the CBSA was reasonable. With respect to the finding of unreliability itself, ABB argued that the mere existence of the association is sufficient to form the opinion that Hyundai Canada's export price determined under section 24 of SIMA was unreliable.

[46] Regarding the deduction of service revenues, ABB argued that the CBSA was correct to look behind non-subject goods and services to arrive at the price of the goods instead of the charges associated with non-subject goods and services. ABB argued that Hyundai Canada's argument concerning the difference between revenues and costs is a red herring and that the crux of the issue is that Hyundai Canada misunderstood the CBSA's calculations. ABB also argues that it was incorrect for Hyundai Canada to argue that the CBSA had double-deducted profits, because neither costs nor revenues associated with non-subject revenue sources were included in either the normal values or the export prices under the CBSA's approach.

[47] With respect to the argument regarding the deduction of costs incurred by third parties, similarly to the points made above with respect to the deduction of services revenue, ABB argued that Hyundai Canada's arguments are without merit. ABB argued that SIMA expressly requires the CBSA to deduct expenses incurred by the exporter, importer, or any other person to arrive at an ex-factory price and that not deducting these expenses would preclude an apples-to-apples comparison of normal values and export prices.

ANALYSIS

Jurisdiction and standard of review in this appeal

[48] In an appeal under section 61 of SIMA, the Tribunal's proceeding is an appeal *de novo*; it is not a review of the prior decision on the basis of the CBSA record and on a reasonableness standard. The Tribunal's decision is in turn subject to an appeal to the FCA "on any question of law" and subject to a standard of review of correctness under the *Vavilov* principles.[18]

[49] In view of the above, it is not strictly relevant how the CBSA arrived at the decisions being challenged but only whether the decisions were correct. In particular, and as discussed in more detail below, any CBSA policy applied with respect to the determination of export prices is not dispositive. The Tribunal is tasked with correctly interpreting SIMA and making its decision accordingly.

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[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov* (19 December 2019), 2019 SCC 65 [*Vavilov*].

The general legislative scheme of SIMA

[50] The modern rule of statutory interpretation requires that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[19] Thus, and to fully appreciate the nature of these appeals and the arguments made by the parties, certain legislative background should be set out.

[51] SIMA focuses on the comparison of export prices and normal values to determine whether anti-dumping duties should be assessed against the importer. One basic principle is noteworthy—this comparison must be made fairly in the context of the applicable commercial facts.

[52] This principle is succinctly outlined in the World Trade Organization's (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), which is the multilateral treaty that outlines internationally agreed principles for anti-dumping laws. SIMA implements the Anti-dumping Agreement in Canada through its own formulation of provisions. Articles 2.1, 2.3 and 2.4 of the Anti-dumping Agreement are particularly relevant in this context and state as follows:

> 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
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> 2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is *unreliable* because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.
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> 2.4 *A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level*, and in respect of sales made at as nearly as possible the same time. . . . In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. . . .
>
> [Emphasis added]

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19 Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), cited in *Rizzo v. Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 at 41. See also *Concrete Reinforcing Bar* (14 October 2020), RR-2019-003 (CITT) at para. 42.

[53] The details of these principles are implemented into Canadian law and reflected in SIMA provisions contained in sections 15 to 19 (regarding normal values), 24 to 25 (regarding export prices), 30.1 (regarding the margin of dumping) and in the Regulations.[20]

[54] It is sufficient to summarize these provisions as providing various methods to calculate normal values and export prices to arrive at an assessment of anti-dumping duties. The proper method to calculate export prices is the subject of this appeal.

[55] Paragraph 25(1)(b) of SIMA provides that "[w]here . . . **(b)** the President is of the opinion that the export price, as determined under section 24, is unreliable **(i)** by reason that the sale of the good for export to Canada was a sale between associated persons . . . ."

[56] The first part of this provision refers to the authority of the President to form an opinion that an export price determined under section 24 is unreliable. The second part of the provision establishes the legal and factual conditions in which this opinion can be formed, i.e. the existence of a sale between associated persons. The parties do not dispute that these appeals involve sales between associated persons.

[57] The word "opinion" is defined, in part, to mean "'a belief or assessment based on grounds short of proof; a view held as probable'".[21] There is no dispute between parties as to the nature of the authority that this language confers to the President; it is somewhat discretionary, but ultimately the President can either accept the export price that is determined under section 24 or reject it if he believes that the price is "unreliable".

[58] At this juncture, it is important to recall the positions of the parties on this issue. Hyundai Canada argued that, in determining whether the section 24 export price was reliable, the President simply compared the section 24 and paragraph 25(1)(d) export prices and did not consider other relevant factors that would have led to a different conclusion as to the reliability of the section 24 export price.

[59] The CBSA argued that the use of a comparison between section 24 and section 25 export prices, and the formation of the opinion of the President based on the result of that comparison, are in conformity with the policy that is set out in the SIMA Handbook. The CBSA claimed that the reliability test applied in this case is valid.

[60] ABB submitted that the President did not have to conduct a price comparison before reaching an opinion that the section 24 export price was unreliable; the mere existence of the association is sufficient to form the opinion (the CBSA itself does not take this position).

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20 See, for example, section 7 of the Regulations regarding delivery costs and section 9 regarding substitution of trade levels.

21 *Family and Social Services (Re),* 1997 (AB OIPC) at 42, citing *The Concise Oxford Dictionary*; online: <https://www.canlii.org/en/ab/aboipc/doc/1997/1997canlii15913/1997canlii15913.pdf>. This definition has likewise been accepted in more recent findings of Alberta's Office of the Information and Privacy Commissioner and other provincial bodies of the same nature. See for example, *Workers' Compensation Board (Re),* 2018 (AB OIPC) at 37; online: <https://www.canlii.org/en/ab/aboipc/doc/2018/2018canlii128504/2018canlii128504.pdf>.

[61] The Tribunal agrees with Hyundai Canada and the CBSA that, no matter how the President's opinion is described or arrived at, it involves a conclusion as to whether the export price is unreliable. The Tribunal finds that the mere existence of association does not mean that the relevant export price is unreliable. This would amount to reading out the term "unreliable"; the term would be completely superfluous, as Parliament could have directed the President to determine export prices under section 25 based on the sole requirement of the existence of a sale between associated persons without any reference to the reliability of the pricing.

[62] Accordingly, the first question raised by this appeal is the basis upon which the President can form the opinion as to the reliability of the export price.

[63] In the case at hand, the opinion of the President, as stated in the CBSA's decision and pleadings, is based entirely on a comparison of the export prices determined using the methodology of section 24 of SIMA with the export prices determined by the President using the methodology of paragraph 25(1)(d). As noted above, this comparison results in a measurement of whether the amount for profit actually earned on the resale was equal to or above the average amount for profit earned by the Canadian industry on similar sales in 80 percent or more of sales.

[64] The Tribunal acknowledges that SIMA does not impose any particular approach or methodology for reaching an opinion as to whether an export price is unreliable. It only specifies that an opinion of unreliability must be "by reason that the sale of the goods for export to Canada was a sale between associated persons". However, although broad in appearance, this discretionary authority is not without limits.

[65] Administrative discretion must be exercised within the confines of the enabling legislation. This entails a consideration of all relevant factors and no fettering of discretion, i.e. no limitation or abdication of the discretionary authority that has been conferred by the legislator.[22]

[66] While the use of administrative guidelines or policies, such as the SIMA Handbook, to guide the exercise of discretionary authority is well recognized as a matter of public administrative law, the existence of such guidelines or policies is not determinative of whether the decisions taken pursuant to these guidelines or policies are correct. Their content as well as their application must be in conformity with the enabling legislation. Although valid "as such" (*de jure*), a guideline or a policy may be invalid "as applied" (*de facto*). This is the test that must be applied in the context of the President's exercise of the authority under section 25.

[67] However, before assessing whether the President's exercise of discretion was in conformity with section 25 of SIMA, the Tribunal must determine what the individual terms of the provision mean and what these individual terms mandate in the aggregate.

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22 See, for example, *Tenneco Automotive Operating Company Inc. v. President of the Canada Border Services Agency* (12 March 2020), AP-2019-019 (CITT) at para. 23.

Meaning of "unreliable"

[68] The dictionary meaning of reliable is "that may be relied upon" or "of sound and consistent character or quality".[23] "Reliable" has also been defined as "in which reliance or confidence may be put, trustworthy."[24]

[69] The definition includes a qualitative aspect to the concept of reliability. There must be something that concerns the character or the qualities of that element that affects the soundness or the consistency of that element to determine its reliability.

[70] Applying these definitions to the context of section 24 of SIMA, it seems clear that, in order to determine if an export price is unreliable, the President must form an opinion about the character or qualities of the export price.

[71] It seems plain that the purpose of constructing export prices under section 25 of SIMA is to account for situations where the actual price between the exporter and the importer does not reflect normal commercial considerations, including but not limited to circumstances where the sale is between associated parties and therefore may be unreliable. The above-referenced provisions of section 25 of SIMA and the Anti-dumping Agreement support this interpretation, as do the WTO decisions cited by the parties.[25]

[72] The concept of reliable pricing in anti-dumping law must relate to using a price that is appropriate to arrive at an assessment of anti-dumping duties and conversely avoiding the use of inappropriate prices. To prevent potential mischief, the provisions of SIMA mandate the construction of a price which presumably reflects a price unlikely to produce such mischief.

[73] However, it must be noted that associated or related party transactions do not necessarily result in prices that are inappropriate or unreliable for SIMA purposes. In other words, association is not the mischief in and of itself. This conclusion would be totally divorced from the commercial context and the object and purpose of the legislative scheme. Here, it is apt to note that section 25 of SIMA does address similar goals with respect to *unrelated* party transactions. For example, subparagraph 25(1)(b)(ii) deals with compensatory arrangements which can occur where there are arm's length transactions and prices.

[74] Association between parties is only a prerequisite for undertaking an analysis of the pricing in the relevant transaction, contrary to the position taken by ABB in these appeals. A transaction between "associated" parties does not mean, in and of itself, that the price is "unreliable" for SIMA purposes. As discussed above, this is made clear by the legislative provisions themselves, which require both terms to apply for the President to apply section 25; otherwise, the term "unreliable" in the provision would be superfluous.

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23 Exhibit EA-2019-008-07B at 906.

24 *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods From Korea* (WT/DS488/R) at 7.147.

25 Panel Report, *European Union* – Biodiesel (Indonesia), WT/DS480/R; Panel Report, *United States – Stainless Steel (Korea)*, WT/DS179/R; Panel Report, *United States – Tubular Goods (Korea)*, WT/DS488/R; Exhibit EA-2019-008-38 at 10–12.

[75] Whether a price is a proper one for the purposes of SIMA requires a consideration of all factors that are relevant to the transaction. Therefore, to determine whether a section 24 export price is unreliable within the meaning of paragraph 25(1)(b), one must consider all factors that are relevant to the export transaction in question.

[76] As set out above, the SIMA Handbook states that the President will "normally" conclude whether the section 24 export price is unreliable based on the results of the comparison of the section 24 and section 25 export prices, which it argued allows it to uncover situations of "hidden" or "secondary dumping". The CBSA defines hidden dumping as situations where the importer and exporter are absorbing the effects of the dumping as between them (presumably because they are related parties and have come to an arrangement) but where the importer subsequently sells the goods at an unprofitable price in the Canadian market.

[77] The CBSA's policy and arguments suggest that the only reason to construct a section 25 export price is to account for situations of hidden dumping; however, this is not supported by the plain wording of the legislation. As an obvious example, section 25 of SIMA is also used to account for situations where parties are engaged in compensatory arrangements. The Tribunal notes that the CBSA has not submitted any legislative history or any other material that supports its contention that the mischief that section 25 is intended to remedy is that of hidden dumping.

[78] Further, through its adoption of a reliability test that compares section 24 and section 25 export prices, the CBSA has essentially adopted an interpretation of "reliable" that is limited to "not engaged in hidden dumping" or, even more specifically, where "reliable" can only mean "where the importer is realizing an amount for profit that is equal to or above the average industry amount for profit on the majority of its transactions". This is not consistent with the interpretation of "reliable" developed above, which is that the term must relate to the character and qualities of the export price transaction *between the exporter and the importer*. While artificially increasing the sale price between the importer and exporter to mask dumping would definitely be one way in which the price between the exporter and importer does not reflect commercial considerations, it is not the only way and, again, the reliability test does not directly measure this but rather measures the profitability of the importer's resale of the goods as compared to average industry profit.

[79] To the extent that the CBSA's policy represents an interpretation of the term "reliable", the Tribunal therefore considers that the CBSA has assigned a meaning to "reliable" that is overly restrictive and not based on the plain meaning of the term, as set out in the above paragraphs. While the President has considerable discretion in forming the opinion that prices are not reliable, he cannot adopt an interpretation that is not supported by the terms of the legislation.

[80] Further, a determination of reliability that is focused exclusively on a mathematical formula comparing section 24 and section 25 export prices, with the objective of determining what should have been the appropriate level of profit realized on the importer's resale of the goods, falls short of what would constitute an appropriate consideration of relevant factors that determine the reliability of the section 24 export price.

[81] An approach that is supported only by such a test ignores a number of other considerations that would seem, in all logic, to be relevant to what contributes to the establishment of a reliable export price. All the approach adopted in this case does is provide some benchmark prices based on arbitrarily determined criteria. However, as discussed above, the test used to determine whether an export price is unreliable in this case is problematic because it does not assess the character and quality of the section 24 export price per se. The test only compares two sets of prices, the section 24 export price and the section 25 export price. This, in itself, is insufficient to form an opinion as to the "reliability" of the section 24 export price.

[82] The Tribunal notes that the CBSA's policy also indicates that other factors may be relevant and should be considered:

> In the case of sales between associated exporters and importers, a reliability test will normally be conducted and, depending on the results of this test, section 24 or 25 of SIMA would be used to determine export price. *It should be noted, however, that, depending on the circumstances of the case, other factors may also be taken into consideration by the President in forming an opinion concerning the reliability of the export price as calculated pursuant to section 24 of SIMA.* Having said this, when the results of the reliability test show that the export price as calculated under section 25 of SIMA is lower than the result obtained using section 24, the President normally will conclude (forms the opinion) that the section 24 export price is unreliable. . . .[26]
>
> [Emphasis added]

[83] However, there is no evidence that such other factors were taken into account by the President in this case.

[84] Having concluded the above, the Tribunal must then move on to outline the proper criteria to form an opinion that prices are "unreliable".

The proper criteria for a reliability opinion

[85] A proper reliability test must examine the section 24 export price in terms of its character or quality. It must assess reliability on the basis of all relevant factors such as the general and specific economic commercial conditions that existed at the time of the transaction, the consistency and accuracy of financial books and records that normally reveal the financial situation of the parties to the transaction, the particular nature of the goods that are the subject of trade, and the commercial context in which the transaction is completed. The reliability test must address the specific mischief which is to be prevented such as manipulation of the prices, etc.

[86] However, the test used in this case to determine whether an export price is reliable did not assess the character and quality of the section 24 export price; it only compared two sets of prices—the section 24 export price and the section 25 export price. This, in itself, is insufficient to form an opinion as to the "reliability" of the section 24 export price.

[87] As the Tribunal finds was the case in these appeals, where the guidelines and the policy contained in the SIMA Handbook are interpreted by the CBSA in such a manner as to limit the reliability test to a mere comparison of the section 24 export price to the section 25 export price, the Tribunal considers that this is an incorrect interpretation of the statute.

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[26] Exhibit EA-2019-008-07B at 1314.

[88] By adopting this interpretation, the CBSA limited the scope of the considerations that the President must take into account in forming an opinion as to the reliability of the section 24 export price in accordance with paragraph 25(1)(b). This is not a correct interpretation and it led to an outcome which may not be correct on the facts.

[89] However, the Tribunal does not know what the CBSA considered in its decision. Therefore, in these circumstances, the Tribunal must remand this decision back to the CBSA for a reconsideration on the basis of the Tribunal's reasons.

[90] Given the above, the Tribunal wishes to offer the following guidance for the calculation of section 25 export prices, should that ultimately be necessary.

Deductions made in re-determining export prices under sections 24 and 25 of SIMA

Deduction of service revenues (versus expenses)

[91] Hyundai Canada submits the following:

(i) The deduction of service revenues was incorrect, because the application of paragraph 25(1)(d) requires the deduction of an amount for profit and the importer's expenses (i.e. direct expenses and indirect selling expenses) in selling an assembled good, not the deduction of revenues;

(ii) There is an "obvious mismatch" when service revenues are deducted in the paragraph 25(1)(d) calculation but the amount for profit calculation is based on manufacturing profits, which include service revenues; and

(iii) The CBSA has an unfair policy of selecting the higher of service expenses or revenues to deduct (i.e. "higher-of rule") for the purpose of depressing the section 25 export price.

[92] In its supplemental arguments, Hyundai Canada stated that the CBSA has no right to remove services from the price of the subject goods.

a. Deduction of service revenues

[93] The basic purpose of SIMA is to address the dumping of *goods*. It is not intended to address the dumping of services. This is clear from the language of SIMA in general and of section 25 in particular.

[94] The removal of services from the calculation of export prices of goods does not have to be expressly provided for in SIMA, as implied by Hyundai Canada's argument. It is implicit as all of the relevant provisions of the act refer to "goods"[27] rather than "goods and services". Section 25 is about finding the true value of the goods that were imported. It is about the elements (profit and costs) that constitute the value of the goods as the object of trade.

[95] This aspect of the present appeals is concerned with the value of services purchased separately from the transformer[28] and with whether such value should be part of the "price for which the goods were sold" by the importer under paragraph 25(1)(d) of SIMA. The words of that expression indicate clearly the two constituents of the transaction in question, the "price" and the "good" that was the object of trade. The word "price" is generally understood to mean "the amount of money or goods for which a thing is bought or sold".[29] It is also generally understood that the price of an item is a reflection of its value in terms of its costs of production and sale and an amount for profit.[30] In that sense, the expression, "price for which the goods were sold", indicates that what is being considered here is the value of the goods that were sold, and it leaves no doubt that the price that is considered is for "goods" as opposed to any other object of trade such as services or intellectual property.

[96] Therefore, the value of services that are a separate and distinct object of trade and do not contribute to the value of the subject good should not be included in the "price for which the goods were sold". It would be an error for the CBSA to include the price of services in its calculations where it is not demonstrated that those services were part of the same transaction as that of the transformer and that their value contributes to the value of the subject goods themselves. The prices of those services were set out separately from the prices of the goods and the evidence establishes no connection between the value of the imported transformers themselves and the value of the services that were excluded by the CBSA at the outset of the calculation. In all appearances, those services were distinct and were not part of the consideration when the price of the transformers was set.[31]

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27 SIMA regulates dumping and subsidization practises in Canada. The goods in question in this appeal were found to be dumped and to have caused injury and, as a result, were subjected to anti-dumping duties. The word "dumped" in section 2 is defined in relation to any goods as meaning "that the normal value of the goods exceeds the export price thereof". Section 25 sets special rules for determining the export price of subject goods in certain specific circumstances. In its relevant passages, subsection 25(1) states that where, in respect of *goods* sold to an importer in Canada, the President is of the opinion that the export price, as determined under section 24, is unreliable, the export price of the *goods* is, if the *goods* are imported for purpose of assembly, the price of the goods as assembled less an amount equal to the aggregate of certain amounts for profit and costs for the *goods* in question.

28 The price charged for these services was extraneous to the resale price of the transformers themselves. This was evidenced by the fact that these services were sometimes listed separately on purchase orders, invoices, and contracts. See, for example, Exhibit EA-2019-008-16A (protected) at 922, 935, 936.

29 Exhibit EA-2019-008-07B at 910.

30 SIMA is a piece of legislation that is economic in nature, and nothing indicates that Parliament would have intended a meaning to the word "price" that does not reflect its ordinary economic meaning.

31 The Tribunal does not contest that there may be situations where the value of services is part of the price for which goods are sold under paragraph 25(1)(d) of SIMA. This seems to be clear from the language of the provision itself, which provides for the deduction of certain costs that could be related to services. See for instance, subparagraph 25(1)(d)(iii), which relates to costs "in any manner related to the assembly [. . .] of the goods", or clause 25(1)(d)(v)(A), which relates to costs, charges and expenses "resulting from the exportation of the imported goods or arising from their shipment . . . that are incurred by the exporter or importer". Such language, by necessary implication, indicates that the value of services-related elements may be part of the price

[97] For these reasons, the Tribunal concludes that these deductions are not deductions from the section 25 export price. Instead, they are an amount representing the value of services that were correctly removed from the section 25 calculation at the outset as not pertaining to the value or price of the subject goods.

b. Deduction for profits

[98] Hyundai Canada also seemed to challenge the deduction for profits from the section 25 resale price while, at the same time, it stated that:

> *None of the parties to these appeals take issue with the President's use of the 2017 amount for profit in the President's calculation of the Paragraph 25(1)(d) export prices in the 2019 Review and the anti-dumping duty assessments that are the subject of these appeal*[*s*]. However, facts relating to the amount for profit calculation and specifically whether the amount for profit deducted includes profits earned on Services performed in connection with the resale of transformers are relevant to determining whether the President improperly deducted profits from the Appellants [*sic*] Paragraph 25(1)(d) export prices.[32]
>
> [Emphasis added]

[99] As the amount for profit is not being challenged, its deduction cannot be an issue regardless of whether there are amounts regarding profit from services in the profit calculation. In any event, the Tribunal agrees with the submissions of the CBSA and ABB on the merits of this issue.[33] The amount for profit is calculated by applying a ratio to the cost of production of the subject goods, which does not include the non-subject goods or services.

c. Deduction of the higher of an expense or revenue

[100] Hyundai Canada argued that the CBSA has an unfair policy of selecting the higher of service expenses or revenues to deduct for the purpose of reducing the section 25 export price.

[101] The Tribunal recalls that section 25 permits the deduction of expenses from the resale price, not revenues. This is regardless of whether the expense was reimbursed at some point. While the reimbursement may properly form part of the resale price, i.e. be added to the starting point of the calculation, it can never be a deduction.

[102] Additionally, the Tribunal recalls that the CBSA represented that it removed all amounts in respect of services from the section 25 calculation. If any of the above "expenses" were not truly deductions in respect of the goods but were removed because they were in respect of services, this issue has been addressed by the Tribunal above. As a further aside, while the Tribunal is not convinced that the evidence shows that the CBSA engaged in this practice, it expects the CBSA to calculate the section 25 export price in the manner set out by the Tribunal.

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for which the goods were sold. However, as indicated above, that value would need to be demonstrated to be contributing to the value of the goods sold. It would also need to have been part of the consideration of the price of the goods sold.

32 Exhibit EA-2019-008-27B at para. 68.

33 Exhibit EA-2019-008-39 at 11–20; Exhibit EA-2019-008-38 at 6–9.

Deduction of third-party expenses

[103] Hyundai Canada submitted that the expenses deducted should be those incurred by the importer and not include third-party expenses, because the paragraph 25(1)(d) calculation is intended to be an estimate of what the importer would have paid for the goods. Hyundai Canada also submitted that the "higher-of rule" discussed above was applied with respect to third-party expenses versus related revenues.

[104] This is not a correct interpretation of the relevant part of section 25. It is well established that although the word "or" is used to link alternatives in ordinary parlance, it can be read conjunctively or disjunctively in statutory interpretation. In this case, a disjunctive interpretation would run counter to the scheme of the Act, which aims for a fair comparison of normal values and export prices at the same trade level, amongst other criteria. This is what the CBSA was correctly doing in deducting all expenses back to the ex-factory price.

Application of paragraph 25(1)(c) versus paragraph 25(1)(d)

[105] ABB submits that paragraph 25(1)(c) should be applied rather than paragraph 25(1)(d), because the goods were sold "in the condition in which they were or are to be imported" (i.e. unassembled) rather than "for the purpose of assembly". However, all parties agreed that it would make no difference to the outcome of the calculation.

[106] Since nothing turns on the outcome of this question in the context of this proceeding, for reasons of judicial economy, the Tribunal will not address whether paragraph 25(1)(c) should be applied rather than paragraph 25(1)(d).

DECISION

[107] Each of the appeals is allowed in part. The Tribunal remands the President's decision in each appeal back to the CBSA for a reconsideration on the basis of the reasons set out above.

Serge Fréchette

Serge Fréchette
Presiding Member