



## Memorandum D14-1-9

Ottawa, January 23, 2017

### Information Pertaining to the Acceptance, Enforcement and Renewal of Undertakings in Dumping and Subsidy Investigations

#### In Brief

1. This memorandum was revised to reflect the amendments to the [Special Import Measures Act](#) that came into effect on June 22, 2016.
2. With respect to undertakings, these amendments provide that the President of the Canada Border Services Agency may not accept an undertaking where the President, in making a preliminary determination, determines that the margin of dumping of, or the amount of subsidy on, the goods is insignificant.

This memorandum explains the administration and enforcement procedures in relation to undertakings under the [Special Import Measures Act](#) (SIMA).

#### Guidelines and General Information

##### Definition of an Undertaking in a Dumping Investigation

1. An undertaking is an offer made voluntarily by an exporter to the President of the Canada Border Services Agency (President) to increase the selling price of goods so that the margin of dumping or the injury to Canadian industry is eliminated. An undertaking takes the form of a written commitment to adhere to specific conditions in exporting goods subject to an investigation. Attached to this memorandum is an example of the information included in an undertaking in a dumping investigation. Although undertakings are tailored to the specific circumstances of each investigation, this example covers the essential features that must be addressed.

##### Definition of an Undertaking in a Subsidy Investigation

2. In a subsidy investigation, an undertaking is a voluntary offer by a foreign government to:
  - (a) eliminate the subsidy;
  - (b) limit the amount of subsidy on the goods exported;
  - (c) limit the quantity of goods shipped to Canada that are subsidized; or
  - (d) otherwise eliminate the injurious effects of the subsidizing.
3. In a subsidy investigation, an undertaking can also be an offer made voluntarily by an exporter, with the written consent of the government of the country of export, to increase the selling price of the goods to the importer so that the injurious effect of the subsidy is eliminated.

## **Effect of the Acceptance of an Undertaking**

4. The collection of provisional duty, anti-dumping duty or countervailing duty is suspended and, except for the situation described in paragraph 17, the dumping or subsidy investigation is suspended.

## **Consultations and Time Limit for Offering an Undertaking**

5. Before accepting an undertaking aimed at the elimination of injury, the Canada Border Services Agency (CBSA) normally consults with complainants to seek their views on the levels of pricing necessary to eliminate the injury caused by the dumping or subsidizing. These consultations are general in nature because of the need to protect confidential information submitted by the exporter or foreign government. Such discussions may not be needed before accepting an undertaking that proposes to eliminate the estimated margin of dumping or the amount of subsidy.
6. An undertaking can only be accepted by the President after a preliminary determination of dumping or subsidizing. However, if, in making a preliminary determination, the President determines that the margin of dumping of, or the amount of subsidy on, the goods of a country is insignificant, the President cannot accept an undertaking. In addition, the President will not accept an undertaking after the issuance of a final determination of dumping or subsidizing.
7. Undertakings should be offered as early in the process as possible, and no later than 60 days after the preliminary determination of dumping or subsidizing, to allow sufficient time for a complete analysis. The exporter or the foreign government may revise undertaking offers after consultations with the CBSA.
8. Any party who wishes to be notified when the CBSA receives an undertaking offer must inform the CBSA that he/she wishes to be notified. The CBSA will notify those parties and post notice on the CBSA Web site that an undertaking offer has been received. Interested parties have nine days from the day the CBSA receives the undertaking offer to provide comments on its acceptability. The President is required to consider these representations before deciding whether to accept the undertaking.

## **Requirements**

9. Section 49 of SIMA contains the requirements for the acceptance of undertakings by the President.
10. In a dumping investigation, written undertaking offers must be made individually by exporters involved in the investigation. The undertaking option may, however, be discussed with a representative from an association or a group of exporters. In a subsidy investigation, written undertaking offers must be made by the government of the country of export or by the individual exporters with the consent of the government of the country of export.
11. Undertaking offers by exporters in a dumping investigation, or by governments or exporters in a subsidy investigation, must account for "all or substantially all" of the dumped or subsidized imports under investigation. The term "all or substantially all" is normally interpreted to mean 85 percent or more of the volume of dumped or subsidized imports under investigation. However, representation of 85 percent of the volume of dumped or subsidized goods does not necessarily mean that the

undertaking will be accepted. For example, if an exporter not included in the 85 percent has the potential to ship large quantities of dumped goods to Canada, it may be concluded that the undertaking does not cover a sufficient percentage of the trade.

12. In cases involving exports from more than one country, undertakings can be accepted from exporters in a dumping investigation, or governments or exporters in a subsidy investigation, representing "all or substantially all" of the imports from these countries collectively. Therefore, it is not always necessary to obtain undertakings from exporters or governments in each country covered by the investigation. However, undertakings cannot be accepted and the investigation suspended for some exporters or some countries while the investigation continues for others. When the criteria to accept undertakings have been met, the investigation is suspended for all exporters and countries.
13. Price increases proposed in an undertaking must not be higher than necessary to eliminate the estimated margin of dumping in a dumping investigation or the estimated amount of subsidy in a subsidy investigation.
14. Undertakings must be practicable to administer. To facilitate the administration of an undertaking, exporters in a dumping investigation, and foreign governments or exporters in a subsidy investigation, are required to provide information on their domestic markets and export sales to Canada and allow for verification of that information on a regular basis.

### **Amendments of an Undertaking**

15. Once an undertaking is accepted, it can be amended at any time in accordance with its terms. Amendments are usually made to update the selling prices in the undertaking to reflect changes in market conditions. An undertaking can also be amended to cover exports of products included in the product definition of the goods under investigation but not already specified in the undertaking.

### **Confidentiality of an Undertaking**

16. SIMA contains provisions for the treatment and disclosure of confidential information and non-confidential information. An undertaking offer submitted to the CBSA for purposes of a proceeding under SIMA is subject to the confidentiality provisions of the Act and, therefore, must be accompanied by a non-confidential edited version or a non-confidential summary of the offer.

### **Request to Complete the Investigation and the Inquiry**

17. When presenting an undertaking offer, an exporter in a dumping investigation, or a foreign government in a subsidy investigation, can request that the investigation by the CBSA and the inquiry by the Canadian International Trade Tribunal (Tribunal) be completed to make a final determination about whether there is dumping or subsidizing and consequent injury.
18. The request to complete the investigation must be presented to the CBSA simultaneously with the undertaking offer. At the same time, a request to complete the injury inquiry must also be made to the Tribunal.
19. If the Tribunal issues an injury finding, the undertaking remains in effect and, as long as the undertaking is complied with, no anti-dumping or countervailing duties are collected. As mentioned

in paragraph 23, a finding of no injury by the Tribunal terminates the undertaking as well as the investigation.

### **Termination of an Undertaking**

20. The President must terminate an undertaking if, within 30 days of the date of the notice of acceptance of the undertaking, but before a finding by the Tribunal, the President receives a written request to terminate the undertaking from:
  - a) an importer or an exporter of the goods or a complainant in a dumping investigation; or
  - b) an importer or an exporter of the goods or a government of the country of export or a complainant in a subsidy investigation.
21. The President can also terminate an undertaking because the terms of the undertaking have been violated or because of new information or changed circumstances.
22. If the investigation continues while an undertaking is in place, as explained in paragraph 17, the undertaking would be terminated if the President ends the investigation because:
  - a) there has been no dumping or subsidizing of the goods; or
  - b) the margin of dumping or the amount of the subsidy is insignificant.
23. If the investigation continues while an undertaking is in place and the Tribunal subsequently issues a finding of no injury, the President will terminate the undertaking.
24. Except where there is an injury finding in effect, an undertaking can be terminated at any time, if the President is satisfied that the dumping, subsidizing or injury would no longer exist if the undertaking were terminated.

### **Resumption of the Investigation**

25. If an undertaking is terminated for reasons mentioned in paragraphs 20 and 21, the President will resume the investigation from the point of suspension.

### **Additional Undertakings**

26. Except where there is an injury finding in effect, the President can accept an undertaking from an exporter or a government in a subsidy case, which has not previously offered an undertaking, provided that the conditions for acceptance of an undertaking have been satisfied. These conditions are specified in paragraphs 9 to 14.

### **Review and Renewal of an Undertaking**

27. Except where the Tribunal has made an injury finding, SIMA requires an undertaking to be reviewed by the President at least every five years to determine if it still serves the purpose for which it was intended. If so, it is renewed and the investigation continues to be suspended. If, on the other hand, the President determines that the undertaking is no longer required, it expires immediately. However, if the Tribunal has issued an injury finding, the President cannot review the need for continuing the undertaking or allow it to expire. In this situation, the undertaking remains in place until the Tribunal

rescinds its injury finding. If the Tribunal does not review its finding within five years, the finding automatically expires and all proceedings with respect to the investigation, including undertakings, are terminated. The President may, if necessary, terminate the undertaking at any time for the reasons contained in paragraph 21. In such a situation, anti-dumping or countervailing duties are levied on all dumped or subsidized imports. See paragraphs 32 and 33 for details about liability for the payment of such duty.

28. An application for a review by the Federal Court of Appeal or a review by a panel under the *North American Free Trade Agreement* (NAFTA) of a decision by the President to renew or not to renew an undertaking may be made under SIMA.

### **Suspension of Collection of Provisional, Anti-dumping and Countervailing Duties**

29. Section 50 of SIMA states that once an undertaking is accepted, the investigation is suspended unless a request to complete the investigation is received, as explained in paragraph 17. Whether or not a request to continue the investigation is received, no provisional duty, anti-dumping duty or countervailing duty is collected as long as the undertaking is in force and is complied with. This situation continues unless the undertaking is terminated because of a violation, new information, changed circumstances or because a request to terminate has been received by a designated party, as described in paragraph 20.

### **Posting of Bonds Before the Undertaking**

30. A bond received at the regional CBSA office after the preliminary determination, but before the acceptance of an undertaking, may be retained indefinitely, in cases where the investigation is suspended following the acceptance of an undertaking. Indeed, when no request to complete the investigation is subsequently received, the bond covering the goods imported from the date of the preliminary determination to the date of acceptance of the undertaking may be held until all proceedings in the investigation are terminated. To avoid paying fees to maintain the bond, however, importers can make a cash payment to the regional CBSA office for the provisional duty and have the bond returned.
31. Further information with respect to refunds of provisional duty and bonds may be found in [Memorandum D14-1-7, Assessment and Payment of Duties Under the Special Import Measures Act.](#)

### **Liability for Payment of Anti-dumping and Countervailing Duty for Goods Released Before an Injury Finding by the Canadian International Trade Tribunal**

32. In accordance with section 4 of SIMA, liability for the payment of anti-dumping or countervailing duty, with respect to any goods that are subject to an undertaking that has been terminated for a reason other than a violation, and released before the finding by the Tribunal, begins on the day on which the preliminary determination was made and ends on the day that the undertaking was accepted. The liability also re-starts on the day on which the notice of termination of the undertaking was given and ends on the day of the finding by the Tribunal.
33. In accordance with section 4 of SIMA, liability for the payment of anti-dumping or countervailing duty, with respect to any goods that are subject to an undertaking that has been terminated because of a violation and released before the finding by the Tribunal, begins on the day on which the

preliminary determination was made and ends on the day that the undertaking was accepted. The liability for payment also re-starts on the day on which the undertaking was violated or the 90th day before the day on which notice of the termination of the undertaking was given, whichever date is later, and ends on the day of the finding by the Tribunal.

### **Liability for Payment of Anti-dumping and Countervailing Duty for Goods Released After an Injury Finding by the Canadian International Trade Tribunal**

34. In accordance with sections 3 and 4 of SIMA, when goods are subject to both an undertaking and a finding of injury by the Tribunal and are released after that finding, liability for the payment of anti-dumping or countervailing duty with respect to the subject goods begins when the undertaking is violated or when the President terminates the undertaking because of new information or new circumstances.

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### **Appendix A - Example format of an undertaking in a dumping investigation**

Undertaking offered by (name of company, country of origin/export) to the President of the Canada Border Services Agency.

1. (Name and location of company), hereinafter also referred to as "the Company," offers to the President of the Canada Border Services Agency, hereinafter also referred to as "the President," the undertaking described below and in appendices (make reference to the specific appendices attached, for example: B, C, and D) which are attached to and form an integral part of this undertaking concerning (brief description of subject goods), as defined in paragraph 2, which are the subject of a dumping investigation initiated by the President on (date of initiation) and for which the President issued a preliminary determination of (dumping/subsidizing) on (date of the preliminary determination).
2. This undertaking pertains only to those goods named by the President in the above-noted preliminary determination. Such goods are defined as:  
  

(Product description as defined in the preliminary determination) and are referred to in this undertaking as "the subject goods."
3. The Company agrees not to sell the subject goods for export to Canada at prices lower than (state terms of undertaking, for example, specify whether prices are FOB (freight on board), CIF (cost, insurance and freight), and indicate location) prices stipulated in the grid in Appendix B.
4. The Company agrees not to circumvent this undertaking by any means, including the sale or shipment of the subject goods to Canada through a subsidiary, branch, agent or other company, or by the shipment of the subject goods to Canada from a country other than (country of origin/export).
5. The Company agrees to provide to the Canada Border Services Agency, hereinafter also referred to in this undertaking as "the CBSA," copies of documents described in Appendix C.
6. The Company agrees to provide on the Canadian customs invoice and/or the commercial invoice submitted to meet the CBSA invoicing requirements, the information described in Appendix D.

7. The Company agrees that before the execution of any sale for export to Canada of new products, models or sizes, which fall within the definition of the subject goods in paragraph 2, but are not referred to specifically in Appendix B, to notify the CBSA of such sale, to provide any information that may be requested by the CBSA at that time to determine an appropriate undertaking price, and to amend Appendix B of this undertaking to include such new products, models or sizes.
8. The Company agrees to provide such additional information, which may be required by the CBSA to demonstrate adherence to this undertaking, and to permit, upon request, verification by CBSA officials of any such information provided.
9. The Company agrees to inform the CBSA of any changes in circumstances from those that existed at the time that this undertaking was accepted. This would include changes in domestic prices, unit costs and expenses (including freight and warehousing) or terms of delivery to Canada. The Company agrees, at the discretion of the CBSA, to amend this undertaking, including appendices, in whole or in part, to take into account any such changes in circumstances.
10. The Company agrees that this undertaking shall take effect (on the date of its acceptance by the CBSA) and shall apply to all subject goods released by the CBSA on or after this date.
11. The Company acknowledges the authority of the President to terminate this undertaking at any time after its acceptance where the President:
  - a) is satisfied that the undertaking has been or is being violated;
  - b) is of the opinion that, as a result of new information not available at the time of the acceptance of the undertaking, the undertaking would have not been accepted; or
  - c) is of the opinion that, as a result of changed circumstances, the undertaking no longer fulfills its objectives.
12. The Company shall give the President written notice of its intention to withdraw from this undertaking at least 30 days before the date of such withdrawal.
13. This undertaking shall be binding upon all successors and assignees of the Company.

In witness whereof the Company has hereto affixed its corporate seal, attested by its duly authorized officer(s) on this () day of (), 20().

- Name of company
- Seal
- Signature of witness
- Name and title of witness
- Signature of authorized officer(s)
- (Name(s) and title(s) of authorized officer(s))

14. This undertaking document and the attached Appendices B, C, and D are stamped "confidential" as they contain sensitive commercial information relating to our business operations.



## Appendix B

1. This Appendix is attached to and forms an integral part of the undertaking submitted by (name and location of company) to the President of the Canada Border Services Agency, on (date of submission).
2. In accordance with paragraph 3 of the undertaking, the Company agrees not to sell the subject goods to importers in Canada at prices lower than the prices stipulated in the following grid and as amended from time to time:

### Undertaking price grid

Product (class/model/number/size)    Product Description    Undertaking Price

3. All prices are quoted in (state the currency of settlement and the unit of measure if appropriate), (state terms of sale, for example, specify whether prices are FOB, CIF, and indicate location). The selling prices in the undertaking price grid shall apply to shipments of the subject goods that are imported into Canada (on or after the date of acceptance of this undertaking by the President or such other date as may be appropriate).

In witness whereof the Company has hereto affixed its corporate seal, attested by its duly authorized officer(s) on this ( ) day of ( ), 20( ).

- Name of company
- Seal
- Signature of witness
- Name and title of witness
- Signature of authorized officer(s)
- Name(s) and title(s) of authorized officer(s)

## Appendix C

1. This Appendix is attached to and forms an integral part of the undertaking submitted by (name and location of company) to the President of the Canada Border Services Agency, on (date of submission).
2. In accordance with paragraph 5 of the undertaking, the Company agrees to provide the CBSA with the following documents:
  - a) Each time there is a price change in the Company's domestic market, a copy of the notification letter, if any, sent to customers along with the revised price lists. These documents will be faxed or sent via e-mail immediately to the attention of the Director of (Division), Trade and Anti-dumping Programs Directorate, accompanied by a covering letter referring to this undertaking. The original documents will be forwarded to the CBSA by express delivery, to the address in paragraph (c) below;
  - b) An amended Appendix B will also be faxed or sent via e-mail at the same time as the transmittal is being made, in accordance with paragraph (a) above. The amendment will reflect the revised undertaking prices calculated by (details regarding methodology used in amending Appendix B including an explicit restatement of the terms of sale, currency of settlement and unit of measure, where required), to the current prices in effect as stipulated in the undertaking price



grid contained in Appendix B. The original document will be forwarded to the CBSA by express delivery, in conjunction with the documents noted in paragraph (a) above; and  
 c) (State other documents which will be provided and when they will be provided.) These documents will be forwarded under a covering letter referring to this undertaking to:

Director of (Division)  
 SIMA Registry and Disclosure Unit  
 Trade and Anti-dumping Programs Directorate  
 Canada Border Services Agency  
 100 Metcalfe Street, 11th Floor  
 Ottawa, ON K1A 0L8

In witness whereof the Company has hereto affixed its corporate seal, attested by its duly authorized officer(s) on this () day of (), 20().

- Name of company
- Seal
- Signature of witness
- Name and title of witness
- Signature of authorized officer(s)
- Name(s) and title(s) of authorized officer(s)

## Appendix D

1. This Appendix is attached to and forms an integral part of the undertaking submitted by (name and location of company) to the President of the Canada Border Services Agency, on (date of submission).
2. In accordance with paragraph 6 of the undertaking, the Company agrees to provide on the Canadian customs invoice and/or the commercial invoice, submitted to meet Canadian customs invoicing requirements with respect to each shipment of the subject goods, the following information:
  - a) Customer's order number and date of order;
  - b) Product (class/model/number/size, etc.);
  - c) Product description in sufficient detail to match the applicable description of the subject goods found in the undertaking price grid in Appendix B;
  - d) Terms and conditions of sale;
  - e) Quantity of (product) in (unit of measurement) for each (class/model/number/size, etc.); and
  - f) Unit price of the (product) in (currency of settlement) for each (class/model/number/size, etc.).
3. In addition, the Company agrees to certify on each document: "These prices are in accordance with (name of company)'s current undertaking accepted by the President of the Canada Border Services Agency, on (date of acceptance by the President)."

In witness whereof the Company has hereto affixed its corporate seal, attested by its duly authorized officer(s) on this () day of (), 20().

- Name of company
- Seal
- Signature of witness
- Name and title of witness
- Signature of authorized officer(s)

- Name(s) and title(s) of authorized officer(s)

<b>References</b>	
<b>Issuing Office</b>	Trade and Anti-dumping Programs Directorate
<b>Headquarters File</b>	4205-13
<b>Legislative References</b>	<a href="#"><i>Special Import Measures Act</i></a> , sections 3, 4, 49, and 50
<b>Other References</b>	<a href="#">D1-7-1</a>
<b>Superseded Memorandum D</b>	D14-1-9, May 28, 2013