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Special Import Measures Act Review: Submissions by Woods, LaFortune LLP

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1. These submissions are filed on behalf of Woods, LaFortune LLP in response to the Invitation issued by the Department of Finance to Submit Views on the focused set of potential changes to SIMA described in the Invitation and on the question of whether and how to revise the Special Import Measures Act ("SIMA").

2. Woods, LaFortune LLP is an international trade law firm with offices in Ottawa, Ontario and Montreal, Quebec. The firm provides a wide range of services to our clients including advocacy before domestic courts and international arbitration tribunals, advice on all matters concerning international trade rules and obligations, and advice and representation on Canadian customs and trade remedies. The firm was established in 2014 by veteran trade lawyers who have extensive experience in trade remedies and who have represented numerous clients on SIMA Inquiries conducted by the Canadian International Trade Tribunal since 1995.

I. Overview

3. In its Invitation, the Department of Finance indicated that it intends to consider the potential changes to the SIMA in light of: the effectiveness of the system in addressing injury caused by dumped and subsidized imports; the overall balance of stakeholder interests, including those of producers, downstream users and consumers; transparency and procedural fairness; the administrative burden, both for interested parties and investigating authorities; and compliance with Canada's WTO obligations. The Invitation also allows parties to make additional submissions concerning potential changes to the SIMA.

4. While periodic review of legislation is important, and SIMA's primary purpose of protecting domestic producers should be recognized, it is also important to consider that increased protection for domestic producers will have a negative effect on other Canadian manufacturers, importers, end-users and consumers who rely on imported goods. Any unnecessary increase in the protection afforded to domestic producers will increase the burden on these other stakeholders to the detriment of the Canadian economy as a whole. Therefore, to achieve a fair balance that recognizes the interests of all Canadian stakeholders, we submit that the better approach would be for the Department to consider the following questions:

i) Does the SIMA provide adequate protection to domestic producers?

ii) If the SIMA provides adequate protection, could the SIMA be amended to benefit other stakeholders (other Canadian manufacturers, importers, end-users and consumers) in a manner that does not reduce the protection accorded to domestic producers?

iii) Would the amendments to the SIMA violate Canada's WTO obligations?

5. The SIMA already provides more than adequate protection to domestic producers, thus there is no reason for amending the SIMA to provide additional protection. However, important changes should be made to SIMA that would benefit other stakeholders without affecting the level of protection provided to domestic producers. Specifically:

i) The requirement that importers pay assessed SIMA duties to seek a re-determination of a CBSA re-determination should be discontinued and similar action should be taken with respect to the right of appeal set out in the Customs Act.

ii) The period for allowing public interest inquiries to be initiated should be increased.

6. In these submissions, Woods, LaFortune LLP intends to address these issues while responding to the questions set by the Department of Finance with respect to Enforcement and Evidentiary Standards and in our own submissions proposing amendments to the Department.

I. The SIMA Protects Domestic Producers

7. A review of Canadian International Trade Tribunal ("CITT") decisions shows that Canada's domestic producers are provided substantial protection from dumped and subsidized imported goods. This protection is apparent in CITT decision which disclose the following:

(i) Since Preliminary Injury Inquiries were introduced, the CITT has found in favour of domestic producers in virtually every case.

(ii) Between 2005 and 2016, the CITT made injury or threat of injury findings in approximately 77% of cases.

(iii) Between 1990 and 2015, the CITT extended injury findings in approximately 85% of expiry reviews.

(iv) Product exclusions are granted infrequently and only in cases where the requesting party can establish that the product exclusion will not cause injury to domestic producers.

8. Because domestic producers are far more likely to be protected by injury findings and that importers and end-users find it very difficult to obtain product exclusions, the current trade remedy system continues to effectively protect domestic producers from unfairly-traded imports. Consequently, there is no reason to amend SIMA to provide even greater protection for domestic producers because the current level of protection is more than sufficient.

II. Response to Specific Questions in the Invitation on Enforcement

9. The Invitation requested comments on questions related to enforcement that focused on anti-circumvention inquiries, scope inquiries and amendments to further restrict the CITT's discretion to grant product exclusions. Each of these are addressed in turn.

A. Anti-Circumvention

10. We submit that an anti-circumvention inquiry process, as described in the Invitation, should not be included in the SIMA.

11. The purpose of the anti-circumvention inquiry, as described in the Invitation, is to determine whether the scope of an existing injury finding should be expanded to include imported goods that fall outside the product definition. As discussed below, imposing AD/CV duties on non-subject goods without AD/CV inquiry that conforms to WTO requirements is contrary to Canada's international trade obligations. Non-subject goods can only be subject to AD/CV duties following an AD/CV inquiry in which those goods were found to be dumped and/or subsidized and to have caused or threatened injury as a result of the dumping and subsidization. Because there is no other basis upon which AD/CV duties can be imposed on any imported goods, the proposed anti-circumvention process will violate WTO obligations.

12. Furthermore, there is no evidence that circumvention, as described in the Invitation, is an issue in the Canadian market. Minor alternation of parts or assembly to avoid Canadian AD/CV duties is not an issue. The practice of exporting goods through a third party to avoid AD/CV duties amount to fraud which falls outside the scope of the proposed anti-circumvention process. Consequently, even if an anti-circumvention inquiry process could be introduced without violating WTO obligations, there is no circumvention problem that needs to be addressed.

13. It appears that Finance is considering an anti-circumvention inquiry process because some other WTO Member States, including the U.S. and the E.U. have their own mechanism. The fact that some other countries have an anti-circumvention process does not justify Canada in adopting this system if it is unnecessary, as it is in this case. In addition, as is further discussed below, anti-circumvention measures violate WTO obligations and this violation is

not excused simply because some other WTO Members have adopted anti-circumvention mechanisms. Therefore, Canada cannot adopt an anti-circumvention process and claim that the process is justified and consistent with WTO obligations simply because some other Members have implemented an anti-circumvention process.

14. However, if an anti-circumvention inquiry process is included in the SIMA, it must be open and transparent and give all interested parties, including other Canadian manufacturers, importers, end-users and consumers, an opportunity to fully present evidence and argument to the administering body charged with hearing the request. The circumstances giving rise to circumvention must be specifically defined and the question of circumvention must be considered in light of a strict reading of the product definition. Further, the party requesting an anti-circumvention inquiry must bear the burden of establishing that the imported goods at issue meet the specific definition of circumvention.

15. We further submit that safeguards must be included in the SIMA to ensure that any anti-circumvention process introduced is not used to harass and impede imports. To this end, the administering authority should be given the ability to dismiss a request for an anti-circumvention inquiry at an early stage in cases where the responding party or parties can show that the requesting party did not meet its initial burden of proof.

16. Finally, an appeal mechanism must be included to ensure that decisions made by the administering authority can be reviewed by a higher court.

B. Scope Proceedings

17. We submit that the proposed scope review proceeding, as described in the Invitation, is unnecessary.

18. Injury Findings are currently policed and enforced by the CBSA and there is no indication that the CBSA has not been effective in this regard. Furthermore, the domestic producers have the ability to raise scope issues with the CBSA for enforcement, as necessary. We submit that the current system is working well.

19. However, if the decision is taken to include a scope process in the SIMA, it is important to ensure that it is also open and transparent so that all interested parties, including other Canadian producers, importers, end-users and consumers, are given notice and an opportunity to fully participate and to present evidence in support of their position.

20. In all cases, the product definition applied in the Injury Finding must be strictly applied to ensure that only imported goods that fall within the parameters of that product definition can be subject to AD/CV duties. The application of any lesser standard will raise the risk that imported goods that properly fall outside of the product definition are included within scope are will be subject to AD/CV duties. In this case, the scope process would violate WTO obligations.

21. We submit that procedural safeguards must be applied to ensure that any scope proceedings are not used to harass and impede import trade. As with the anti-circumvention inquiry process, the party requesting a scope ruling must bear the burden of establishing that the imported goods at issue are properly considered to fall within scope. The administering authority must be given the right to dismiss a scope inquiry at an early stage if the responding parties can show that the requestor did not meet its burden of proof.

22. Finally, an appeal mechanism must be included to ensure that decisions made by the administering authority can be reviewed by a higher court.

C. Product Exclusions

23. We submit that the SIMA should not be amended to limit the CITT's discretion to grant product exclusions based on end-use or geographic location.

24. The CITT already places extensive restrictions on its discretion to grant product exclusions, granting them only in cases when the party making the request can prove that issuing the product exclusion will not cause injury to domestic producers. In most cases, this is an impossible burden to meet because it requires that the requestor prove a negative; that the product exclusion will not cause injury.

25. This burden of proof is generally even more difficult to meet because the information required to establish that a specific good will not cause injury is often held by the domestic producer and is not available to the requesting party.

26. With respect to end-use and geographical location, the CITT also requires that the requester establish that the product exclusion can be effectively administered by the CBSA. This is a difficult threshold to meet.

27. Because the CITT only grants product exclusions in exceptional circumstances, and where the requesting party can meet the high burden of proof, the CITT only grants a limited number of product exclusions. Thus, there is no reason to place further restrictions on the CITT's exercise of its discretion to grant a product exclusion. Limiting the CITT's discretion in these circumstances will provide unnecessary protection to domestic producers to the detriment of other stakeholders, particularly end-users that require the imported goods for manufacturing in Canada.

III. The SIMA Should be Amended

28. We submit that the SIMA already provides more than adequate protection to domestic producers but fails to balance the interests of other stakeholders, principally other Canadian manufacturers, importers, end-users and consumers. Other Canadian manufacturers have an interest in obtaining imported products for use in manufacturing. Importers have an interest in obtaining imported goods for sale in the Canadian market. Consumers and end-users have

an interest in obtaining imported goods for consumption. The interests of these other stakeholders must be considered as they are all part of the greater Canadian economy.

29. As noted above, the SIMA already provides adequate protection to domestic producers. Therefore, any amendments to the SIMA to add additional protection for domestic producers will amount to unnecessary protection that will impose additional costs on other stakeholders to the detriment of the Canadian economy overall.

30. Therefore, the SIMA should be reviewed to determine how it can be amended to provide benefits to other stakeholders that will not reduce the level of protection accorded to domestic producers. Examples of these potential changes are:

    (i) Eliminate the requirement that importers pay assessed duties as a pre-condition to appealing a CBSA Re-Determination.

    (ii) Extend the time allowed for interested parties to file a Public Interest Inquiry following an Injury or Threat of Injury Finding.

A. Eliminate the Requirement to Pay Assessed Duties as a Pre-Condition to Appealing a CBSA Re-Determination

31. The requirement that importers pay post-importation duty assessments made by the CBSA as a precondition of their review in appeal is unfair and should be eliminated from the SIMA and the Customs Act.

32. SIMA Section 57 gives designated CBSA officers the right to review imports up to two years after they entered Canada to determine whether the goods should have been treated as subject of an Injury Finding and to demand payment of AD/CV duties on those imported goods. SIMA Section 58 gives the importer the right to contest that determination, but the importer's right of appeal is contingent on the importer paying the amount demanded by the CBSA in full.

33. Similar requirements are found in the Customs Act, with the exception of Section 60 which allows for security to be tendered instead of payment, although in our experience this alternative is not used often or found to be practical or affordable. SIMA Section 58 does not include tendering security as a possibility; importers must pay the full amount owing.

34. The requirement that importers must pay duties allegedly owed before they are allowed to appeal a determination will not provide any greater protection to domestic producers because the demand for payment is generally made long after the imported good is landed and sold in the Canadian market. This is because of the process for declaring imported goods that enter Canada. When an importer lands any goods in Canada it must declare the tariff classification, origin and value for duty of those goods as well as whether the imported goods are subject to an AD/CV Injury Finding. The importer pays the customs duties and GST/HST owing based on those declarations. The CBSA accepts those declarations and the

importation is "liquidated" within 30 days of importation. The imported goods then enter the flow of commerce and can be sold to purchasers in the Canadian market. The CBSA then has up to two years after importation to issue re-determination and to demand payment of AD/CV duties on the imported goods. Because of this delay, the demand for payment is generally made long after the goods have been imported and sold. Thus, the requirement to immediately pay the SIMA assessment will not protect domestic producers from injury or cure any injury that may have been caused by the imported goods because the injury will have occurred at or before the point of sale, which generally occurs long before the CBSA's re-determination.

35. Because immediate payment of the SIMA assessment resulting from the CBSA's re-determination will not protect domestic producers, they will not be prejudiced if the requirement to pay the assessment is delayed until after the appeal is heard. However, the requirement that importers pay the assessment to have the right to take the appeal does cause prejudice to Canadian importers. The importers will not have access to the funds that they used or borrowed to pay the assessment while the appeals are heard, which means that they cannot use these funds to support their ongoing business. The costs and lost opportunities suffered by importers that could result from not having access to these funds to support its business activities during the appeal period cannot be cured by interest on the duty assessment paid by the importer at the conclusion of a successful appeal. Since domestic producers are not protected by the requirement that importers immediately pay the assessment while importers are prejudiced, on balance the requirement should be eliminated.

36. Further, an importer with the means to pay an assessment can pursue his appeal while the large majority of importers who simply cannot afford that kind of deposit are deprived of any recourse. It is unfair to those importers that their access to a review should be tied to their ability to pay. Contrast this with the rights granted by SIMA Section 58(1.1)(b) to the U.S. and Mexican governments and to U.S. and Mexican manufacturers and exporters who are allowed to appeal a SIMA assessment "whether or not the importer has paid all duties owing". Clearly Canadian legislation creates a bias in favor of foreign entities; our position, and that of clients we represent, is that this discriminatory treatment simply cannot be tolerated any longer.

37. It is also worth noting that the Canadian International Trade Tribunal, which hears SIMA appeals after they have been first reviewed by the President of the CBSA, is currently examining ways in which it can reduce its own proceedings costs and provide better access to justice to all appellants. If our Canadian courts currently have this concern in mind, surely our government can follow suit.

38. We applaud the Tribunal's efforts in making access to justice a priority. We find it commendable that the Tribunal is engaged in exploring ways to reduce the costs related to its own proceedings and aims to facilitate access to justice for all. That said, it has been our experience that the biggest cost in eventually getting to a Tribunal decision is not incurred at the Tribunal stage but rather at the one which precedes it: the administrative CBSA re-determination stage.

39. In its aim to raise the bar on fairness, the Tribunal is even going as far as contemplating an amending Section 68 of the Customs Act, and perhaps even section 61 of SIMA, seeking the ability to award costs when the situation presents itself. In our view however, seeking the legislative power to award costs would only serve to grant some relief to those who have sufficient means to reach this particular level of higher judicial review. Most small importers would still be left behind.

40. In conclusion on this point, we ask that the Minister of Finance show the same concern for fairness and access to justice that our Canadian courts have expressed in recent times and respond with equal conviction that all importers, big or small, should be able to access a first right of review. SIMA appeals should not only be open to those who have sufficient financial means. We thus request that the SIMA be amended to eliminate the requirement that importers first pay assessments as a pre-condition to exercising a right of appeal and that the *Customs Act* also be amended to eliminate similar requirements.

41. If our request to eliminate the requirement that importers pay SIMA assessments as a pre-condition to launching an appeal of the assessment is not accepted, we request that the SIMA be amended to reduce the timeframe available to designated officers of CBSA to re-determine SIMA from two years to 90 days. This temporal limitation would have the effect of providing improved access to justice to a greater number of importers, especially those with limited financial means.

B. Public Interest Inquiries

42. We submit that the period allowed to interested parties to file a request for a public interest inquiry following an Injury Finding issued by the CITT be extended from the current 45 days to at least 180 days.

43. A public interest inquiry is held to determine whether it is in the public interest to impose AD/CV duties on imported goods in whole or in part.

44. Currently, SIMA Regulation Section 40.1 gives an interested party 45 days from the date an Injury Finding is issued to file a request for a public interest inquiry, which means that the interested party must review the AD/CV duties imposed as a result of the Injury Finding on the imported goods, determine whether or not it considers that imposition of the AD/CV duties at issue would be in the public interest and prepare and file a request for a public interests inquiry in this period.

45. The 45 day schedule is unfair for parties that were involved in the case and would be even more difficult for any interested parties who come after the fact. In addition, the impact of the AD/CV duties on particular products may not become obvious until after the 45 day period has elapsed.

46. The relevant factors considered in a Public Interest Inquiry are not equivalent to the relevant factors considered in an Injury Inquiry. These factors are set out in SIMR Section 40.1(d) and include: the availability of goods of the same description from other suppliers or

markets; the effect of AD/CV duties on competition in the domestic market, the effect that AD/CV duties will have or are likely to have on producers in Canada that use the goods as inputs in the production of other goods or services; the effect that AD/CV duties will have or are likely to have on consumer choice and any other factors relevant in the circumstances. The factors considered in an Injury Inquiry, set out in SIMA Section 37.1(1), include: the increase in volume of dumped or subsidized imports in relative or absolute terms over the period of inquiry; the effect of the dumped or subsidized goods on the price of like goods in terms of price undercutting, price suppression or price depression; the resulting impact of the dumped or subsidized goods on the state of the domestic industry; and any other factors that are relevant in the circumstances. There are similar threat of injury factors set out in SIMR Section 37.1(2). The fact is that Injury Inquiries focus exclusively on whether the dumped or subsidized goods cause injury and do not consider the public interest.

47. Consequently, the Public Interest Inquiry is the first opportunity for the CITT to consider whether it is in the public interest for AD/CV duties to be imposed or to be imposed in the full amount. Since it is unlikely that the 45 days currently allowed to interested parties to determine whether the imposition of AD/CV duties in the full amount or in some lesser amount is in the public interest, it would be reasonable and appropriate to extend the period to file a public interest inquiry to 180 days from the current 45 days.

48. Furthermore, the ability to file a request for a Public Interest Inquiry is currently limited to the 45 days following an Injury Inquiry. The SIMA does not allow interested parties to file a request for a Public Interest Inquiry following a decision to extend an Injury Finding at the conclusion of an Expiry Review. The public interest is not static and can change over time, including over the period between the initial Injury Finding and subsequent Expiry Review findings. To recognize the important role of public interest in trade remedies, it would also be appropriate to allow an interested party to request a public interest inquiry following an Expiry Review. However, because interested parties would have clearly had an opportunity to determine whether it is in the public interest to impose AD/CV duties on imported goods during the currency of the Injury Finding prior to the Expiry Review, 180 days to file the request would be excessive. In these particular cases, it would be reasonable and appropriate to require that interested parties file their request for a public interest inquiry within 90 days.

49. Therefore, to ensure greater fairness the period granted for filing a public interest inquiry should be extended from 45 days to at least180 days in the case of an Injury Finding, and to permit a public interest inquiry to be requested within 90 days of an Expiry Review that extends an Injury Finding.

IV. Compliance with WTO Obligations

50. Any proposal to amend the SIMA should be carefully considered to ensure that it fully complies with WTO obligations.

51. The proposed amendments to SIMA set out above will not violate WTO obligations. However, there are clear problems with some the proposals in the focused set of potential changes to SIMA. The proposal to introduce an anti-circumvention inquiry process, as

described, will violate WTO obligations. The proposal to introduce a scope review process, depending on how it is implemented, could also violate WTO obligations.

A. The Proposed Anti-Circumvention Inquiry Process

52. The WTO Agreements do not permit Members to take anti-circumvention measures related to AD/CV Orders that would extend the application of AD/CV duties to imported goods that fall outside the scope of products defined in the Injury Finding.

(i) The Ability to Adopt Anti-Circumvention Measures Cannot be Read into the WTO Agreements

53. The Invitation states that "[t]he WTO Agreements do not explicitly address anti-dumping or countervailing duty circumvention," which seems to suggest that anti-circumvention measures are possible because they have not been addressed in the WTO. But this is not the case. Anti-circumvention was an issue in the Uruguay Round which resulted in the WTO Agreements and it has been addressed since, but to date there has been no agreement on the scope or process for a potential anti-circumvention mechanism or even on the need for an anti-circumvention process. Consequently, anti-circumvention has been explicitly addressed in the WTO Agreements and it has been noted that there is no agreement on anti-circumvention among the WTO Members.

54. Anti-circumvention was considered during the Uruguay Round. In 1990 the Chair issued a document, referred to as the Dunkel Draft, which was an approximation of the results of the Uruguay Round negotiations that was prepared to facilitate negotiations. The Dunkel Draft included commentaries on the negotiations to identify issues. The Commentary on the Anti-Dumping negotiations noted that the negotiations revealed continuing differences on several points. With respect to anti-circumvention, the Dunkel Draft pointed to the outstanding question of what anti-circumvention provisions are needed and concluded as follows:

> Political decisions are needed to overcome differences on these questions, which have not been resolved in consultations and negotiations passed on draft anti-dumping texts of 9 July, 14 August, 15 November and 23 November.[1]

55. Despite attempts to resolve differences on anti-circumvention, the WTO Members did not agree on an anti-circumvention mechanism. Instead, the WTO Members issues a Ministerial Decision on Anti-Circumvention as part of the WTO Agreements. The Ministerial Decision noted that "while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text." The Ministers decided, therefore, to refer the matter to the Committee on Anti-Dumping Practices for resolution.

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[1] *Final Draft Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* Anti-Dumping Commentary, MTN.TNC/W/35/Rev.1, 3 December 1990, pg 43.

56. In accordance with the Decision, anti-circumvention measures were referred to the WTO Rules Committee for consideration and during the April 1997 meeting of the WTO Committee on Anti-Dumping Practices, the Members established an Informal Group on Anti-Circumvention to consider the issue. The Minutes of the Committee meeting that established the Informal Group showed the extent of the differences between Members on the need for anti-circumvention procedures and the types of procedures.[2]

57. Following informal discussions held May 2008 and December 2008 on a number of issues, including anti-circumvention, the WTO Chair issued revised text that pointed to the extent of the differences between WTO Members. The revised text of the AD and SCM Agreements included the following square bracketed text summarizing the position on anti-circumvention:

> [ANTI-CIRCUMVENTION: Delegations disagree as to whether there should be specific rules on anti-circumvention. Some delegations consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, while other delegations consider that anti-circumvention is a reality, and that rules on anti-circumvention are necessary to achieve some degree of harmonization among the procedures used by different Members. To the extent that rules are included, delegations disagree, *inter alia*, whether numerical thresholds are desirable, whether findings of dumping, injury and causation should be required and whether anti-circumvention measures should be company-specific or country-wide.][3]

58. To date, no agreement has been reached on anti-circumvention measures or the scope of those measures, if they were adopted.

59. The WTO Agreements are treaties that are interpreted on the basis of the rules set out in the Vienna Convention on the Law of Treaties.[4] VCLT Article 31(1) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. VCLT Article 31(2) provides that, in addition to its text, preamble and annexes, the context for interpretation of a treaty includes any agreement relating to the treaty made between all the parties in connection with conclusion of the treaty.

60. The context for interpreting the WTO AD and SCM Agreements includes, therefore, the specific terms of the treaty as well as any agreements made between the parties.

61. As discussed in the following section, the obligations in the WTO AD and SCM Agreements make it clear that AD/CV measures can only be imposed on imported goods following an

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2 *Minutes of the Meeting of the Committee on Anti-Dumping Practices*, G/ADP/10, 24 September 1997, para 109 - 137

3 *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236, 19 December 2008 at page 21

4 *U.S. – Gasoline*, DSR 1996:1, WT/DS2/AB/R, AB-1996-1, Report of the Appellate Body, 29 April 1996, pg 16 - 17

investigation conducted by administering authorities that met all of the requirements of those Agreements and prohibit the imposition of AD/CV duties by another means.

62. The Ministerial Decision on Anti-Circumvention is a decision of the WTO Members which states that no agreement has been reached on circumvention measures. The meetings of the WTO Members held since the Decision was issued have also indicated that there is no agreement on circumvention measures between the parties. This lack of agreement is context for interpreting the WTO Agreements which points to the fact that there is no agreement between the parties. In this regard, it is important to note that the delegate of Japan to the Committee on Anti-Practices held on September 24, 1997 stated that, "as a matter of general principle, anti-circumvention measures are contrary to Article 1 and 18 of the Anti-Dumping Agreement, and Article VI of GATT 1994."[5]

63. As the WTO AD and SCM Agreements do not allow AD/CV measures to be adopted on any basis other than those set out in the Agreements, and the WTO Members have indicated that the anti-circumvention has been raised as an issue but no agreement has been reached, the WTO Agreements cannot be interpreted as either not explicitly addressing anti-circumvention or implicitly allowing anti-circumvention measures to be adopted consistent with WTO obligations. As discussed below, anti-circumvention measures would violate WTO obligations.

64. The fact that some WTO Members have decided to adopt anti-circumvention measures despite the fact that they are inconsistent with WTO obligations is not context for interpreting the WTO Agreements and does not give Canada cover for adopting its own anti-circumvention measures. A Canadian anti-circumvention mechanism, as described in the Invitation, would be inconsistent with WTO obligations.

65. Therefore, an anti-circumvention mechanism cannot be included in the SIMA on the basis that the WTO did not explicitly address anti-circumvention and is, therefore, silent on the matter. Rather, anti-circumvention is not included in the WTO because the Members have not been able to come to agreement on an appropriate anti-circumvention mechanism. Taking this context into consideration, the WTO Agreements do not allow Members to adopt and implement anti-circumventions measures as described in the Invitation and the right to adopt such an anti-circumvention mechanism cannot be read into the WTO Agreements.

(ii) The WTO Agreements Prohibit Anti-Circumvention as Described in the Invitation

66. The obligations in the WTO Agreements specifically prohibit the imposition of AD/CV duties on imported goods through any mechanism other than an investigation that fully complies with the obligations in the WTO AD and SCM Agreements.

67. The WTO obligations concerning AD/CV measures are set out Article VI of the *General Agreement on Tariffs and Trade, 1994* (GATT 1994 Article VI), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994* (the "AD

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[5] *Committee on Anti-Dumping Practices,* Minutes of the Regular Meeting Held on 28-29 April 1997, G/ADP/M/10, 24 September 1997, para 58

Agreement") and the WTO *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). GATT 1994 Article VI granted WTO Members the right to impose AD/CV duties on imported goods that were shown to be dumped and/or subsidized and to have caused or threatened to cause injury through the effects of dumping or subsidization. The WTO AD and SCM Agreements provided greater clarity by setting out the specific requirements to be met before AD/CV could be imposed. Together these WTO Agreements establish a code that applies to all AD/CV measures applied by WTO Members.

68. AD Agreement Articles 1 and 18 make it clear that AD measures may only be imposed following investigations conducted in accordance with the obligations set out in the AD Agreement. SCM Agreement Articles 10 and 32.1 are identical provisions that same effect with respect to CV measures.

69. AD Agreement Article 1 provides, in relevant part, that, "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." The phrase "only under the circumstances" used in Article 1 limits the application of anti-dumping measures to the circumstances provided for in GATT 1994 Article VI and excludes the possibility of anti-dumping measures being applied through any other mechanism.

70. AD Agreement Article 18.1 provides that, "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." The phrase "no specification action against dumping ... can be taken except ..." clearly restricts action against dumping that can be taken by a WTO Member to anti-dumping investigations that are taken under and are consistent with the obligations in GATT 1994 Article VI and the AD Agreement and prohibits the possibility that anti-dumping measures may be applied through any other mechanism.

71. The term "anti-dumping measure" used in AD Agreement Article 1 has been broadly interpreted by the WTO Appellate Body to include any measure against dumping. In *U.S. – Anti-Dumping Act of 1916,* the WTO Appellate Body rejected a U.S. argument that "anti-dumping measure" was limited to definitive anti-dumping duties, price undertakings and provisional measures. If the U.S. argument had been accepted, a range of potential measures, including anti-circumvention measures, could have been permitted. However, the Appellate Body rejected this position and found that "anti-dumping measure" was not limited, as suggested, but would apply to all measures taken against dumping. At paragraph 119 of that decision the Appellate Body stated:

> The first sentence of Article 1 states that "an anti-dumping measure" must be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*. However, as the United States concedes, the meaning of an "anti-dumping measure" in this sentence is "not immediately clear". The United States argues, on the basis of the history of this provision, that the phrase "anti-dumping measure" refers *only* to definitive anti-dumping duties, price undertakings and provisional measures. However, the ordinary meaning of the phrase "an anti-dumping

> measure" seems to encompass all measures taken against dumping. We do not see in the words "an anti-dumping measure" any explicit limitation to particular types of measure.[6]

72. At paragraph 120 of that decision, the Appellate Body went on to state:

> Since "an anti-dumping measure" must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to "an anti-dumping measure", i.e., a measure against dumping.[7]

73. Consequently, as the Appellate Body found that any measure against dumping is an "anti-dumping measure" for purposes of the WTO AD Agreement, all measures against dumping must meet the requirements of GATT 1994 Article VI and the AD Agreement. Any measures against dumping that do not meet these requirements would violate the WTO obligations.

74. In considering the meaning of "no specific action against dumping" used in the AD Agreement Article 18.1, the WTO Appellate considered that "specific action against dumping" is taken in situations that present the constituent elements of "dumping" and, at a minimum, may be taken only when those constituent elements are present. The Appellate Body considered that Article 18.1 clarified the scope of GATT 1994 Article VI by stating that can be taken against another WTO Member except in accordance with the provisions of GATT 1994 as interpreted by the AD Agreement. Thus, the Appellate Body found that Article 18.1 prohibits any "specific action against dumping" when such specific action is not "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". Since the only provisions of the GATT 1994 "interpreted" by the *Anti-Dumping Agreement* concern dumping, the Appellate Body held that Article 18.1 should be read as requiring that any "specific action against dumping" of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.[8]

75. It is interesting to note that during the meeting of the WTO Committee on Dumping Practices which led to creation of the Informal Group on Anti-Circumvention, the delegate of Japan that attended the meeting stated that, "as a matter of general principle, anti-circumvention measures are contrary to Articles 1 and 18 of the Anti-Dumping Agreement, and Article VI of GATT 1994."[9]

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[6] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, AB-2000-5, AB-2000-6, Report of the Appellate Body, 28 August 2000, para 119

[7] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, AB-2000-5, AB-2000-6, Report of the Appellate Body, 28 August 2000, para 120

[8] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, AB-2000-5, AB-2000-6, Report of the Appellate Body, 28 August 2000, para 121 – 124.

[9] *Committee on Anti-Dumping Practices,* Minutes of the Regular Meeting Held on 28-29 April 1997, G/ADP/M/a0, 24 September 2997, para 58.

76. Consequently, the Appellate Body has taken the position that anti-dumping measures may only be applied following a process that conforms to the requirements of GATT 1994 Article VI and the AD Agreement.

77. SCM Agreement Article 10 provides, in relevant part, that "[c]ountervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture." SCM Agreement Article 32.1 provides that, "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

78. The WTO Appellate Body considered the meaning of SCM Agreement Articles 10 and 32.1 and, as they found with respect to AD Agreement Articles 1 and 18.1, the Appellate Body determined that a countervailing duty is a specific action against a subsidy that can only be imposed in accordance with the provisions of GATT 1994 as interpreted by the SCM Agreement. At page 15 of its Decision in *Brazil – Dessicated Coconut,* the Appellate Body stated,

> From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the SCM Agreement. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the SCM Agreement clearly intended that, under the integrated WTO Agreement, countervailing duties may only be imposed in accordance with the provisions of Part V of the SCM Agreement and Article VI of the GATT 1994, taken together.[10]

79. GATT 1994 Article VI sets out the obligations that apply with respect to dumping and subsidization. Article VI:6(a) provides that,

> No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

80. Consequently, the WTO obligations in the GATT 1994 and the AD and SCM Agreements make it absolutely clear that AD/CV duties cannot be imposed on imported goods through any mechanism other than an investigation that fully complies with the obligations in the WTO AD and SCM Agreements.

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[10] *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, AB-1996-4, Report of the Appellate Body, 21 February 1997, pg 15

(iii) The Proposed Anti-Circumvention Process Will Violate WTO Obligations

81. To impose AD/CV duties on imported goods, the proposed anti-circumvention mechanism would have to determine that the imported goods at issue are dumped and/or subsidized and cause or threaten injury as a result of the dumping or subsidization at the conclusion of an investigation that meets the procedural requirements of the WTO AD and SCM Agreements, which include the following:

(i) The process by which an imported goods can be found to be dumped or subsidized - ADA Article 2 and SCM Article 14

(ii) The process by which an imported good can be found to have caused or threatened to cause injury to domestic producers of like products - ADA Article 3 and SCM Article 15

(iii) The process for initiation and subsequent investigation to determine the existence, degree and effect of the alleged dumping or subsidization – ADA Article 5 and SCM Article 11

(iv) The right to all interested parties in the investigation to be given notice and ample opportunity to present all relevant evidence in writing, including the obligation to give foreign producers at least 30 days to respond to any questionnaire – ADA Article 6 and SCM Article 12

These procedural steps are mandatory requirements in the ADA and SCM that must be met before AD/CV duties may be imposed on the specific imported products.

82. It is possible that an anti-circumvention inquiry could result in WTO-consistent AD/CV duties being imposed on imported goods, but only if the inquiry meets all of the foregoing requirements. But if this were the case, there would be no point in introducing the anti-circumvention process because it would unnecessarily replicate the existing Injury Inquiry.

83. However, the anti-circumvention inquiries described in the Invitation will only determine whether the imported goods at issue in the inquiry have been manipulated or developed to deliberately fall outside the scope of an Injury Finding. The inquiry will not consider whether the imported goods at issue have been dumped or subsidized and it will not consider whether the imported goods have caused or threatened to cause injury to domestic producers. Consequently, the anti-circumvention inquiry will not meet the requirements for imposing AD/CV duties set out in GATT 1994 Article VI and the WTO AD and SCM Agreements.

84. The anti-circumvention process described in the Invitation seems to be based on the assumption that imported goods at issue in an anti-circumvention inquiry are dumped and subsidized and have caused or threatened to cause injury on the same basis as imported goods that are already subject to an Injury Finding, but this assumption cannot be made.

85. The goods at issue in an anti-circumvention inquiry fall outside the scope of the product definition applied in the Injury Finding and, thus, were not considered by administering

authorities during the original Injury Inquiry. These goods were not found to be dumped and/or subsidized or to have caused or threatened to cause injury. Furthermore, there is no reason to assume that these imported goods are produced by the same foreign exporters or that like domestic goods to these imported goods are produced by the same domestic producers. None of this issues are addressed through the anti-circumvention inquiry described in the Invitation and they cannot simply be assumed.

86. Because the anti-circumvention process described in the Invitation fails to meet these WTO requirements, AD/CV duties cannot be extended to imported goods at the conclusion of an anti-circumvention process without violating WTO obligations. Therefore, the proposal to introduce an anti-circumvention process in the SIMA should be rejected on the basis that it is inconsistent with WTO obligations.

B. The Proposed Scope Review Process

87. The proposal for a Scope Review Process could violate WTO obligations to extent that it extends the scope of an existing Injury Finding to include goods that fall outside the scope of the product definition used in that Injury Finding.

88. As discussed above, the WTO only permits AD/CV duties to be imposed on imported goods if those goods are found to be dumped and/or subsidized and to have caused or threatened injury to domestic like products as a result of the dumping and/or subsidization at the conclusion of an inquiry that meets WTO obligations. This is the only means by which AD/CV duties may be imposed on imported goods in a manner that is consistent with WTO obligations.

89. If the product definition is strictly applied so that a scope review process only determines whether an imported good presented as falling outside scope is actually a subject good, the scope review process will comply with WTO obligations by ensuring that only those goods that were subject to an AD/CV investigation are subject to AD/CV duties. However, if the scope review process allows the administering authorities to extend AD/CV measures to imported goods that were never subject to an AD/CV investigation, the scope review process will violate WTO obligations.

V. Conclusion

90. It is important to conduct periodic reviews of the SIMA to ensure that it remains an effective mechanism that benefits the Canadian economy as a whole. However, any review of the SIMA should be approached cautiously. Potential amendments should only be made if they are required and only if they comply with Canadian trade obligations.

91. Currently, the SIMA provides more than adequate protection to domestic producers which mitigates against any proposal to amend SIMA to provide additional protection. Additional protection is unnecessary and would harm other stakeholders and the Canadian economy as a whole.

92. The proposals to introduce an anti-circumvention inquiry and a scope inquiry process raise serious questions of WTO-consistently. This is particularly the case with the proposed anti-circumvention inquiry which could not be adopted without violating WTO obligations.

93. Conversely, important amendments to SIMA could be made that would benefit other stakeholders without affecting the level of protection accorded to domestic producers or prejudicing domestic producers to any degree.

94. Therefore, based on the foregoing, we urge the Department:

(i) to not amend the SIMA to extend the protection already granted to domestic producers or to further restrict the CITT's discretion to grant product exclusions;

(ii) to not introduce an anti-circumvention inquiry on the basis that such a process is unnecessary and would violate Canada's WTO obligations;

(iii) to not introduce a scope inquiry process on the basis that such an inquiry process is unnecessary and could be implemented in a manner that would violate Canada's WTO obligations;

(iv) to ensure that if an anti-circumvention and/or scope inquiry process is adopted, that safeguards be implemented as suggested in this Submission to ensure that these inquiries cannot be used to harass and inhibit import trade; and

(v) to adopt the proposals set out in these Submissions to eliminate the requirement on importers to pay assessed duties as a condition of filing an appeal of a CBSA decision and to extend the time allowed to file a public interest inquiry.

All of which is submitted in response to the Invitation to Submit Views on the SIMA Review issued by the Department of Finance.

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