

MEMORANDUM D14-1-5

Ottawa, January 1, 1994

SUBJECT

PROCEDURES FOR RELEASE FROM CUSTOMS OF GOODS
SUBJECT TO PROVISIONAL DUTY UNDER THE
SPECIAL IMPORT MEASURES ACT AND FOR CONTROL OF BONDS
USED TO SECURE PAYMENT OF PROVISIONAL DUTY

This Memorandum outlines and explains the procedures under which imported goods subject to provisional duty pursuant to the Special Import Measures Act (SIMA) may be released from Customs control. In addition, this Memorandum provides information concerning the control of security and the return of bonds and the refund, where applicable, of provisional duty.

GUIDELINES AND GENERAL INFORMATION

1. Where a preliminary determination of dumping or subsidizing in respect of any goods is made, goods of the same description that are imported into Canada are subject to provisional duty during the provisional period.

2. Provisional duty is the amount equal to the estimated margin of dumping determined for the preliminary determination of dumping or the estimated amount of subsidy determined for the preliminary determination of subsidizing. The estimated margin of dumping is the amount by which the estimated normal value of the goods exceeds the estimated export price of the goods.

3. The provisional period refers to the period commencing on the day the preliminary determination is made by the Deputy Minister of National Revenue for Customs, Excise and Taxation and ending on the day the Deputy Minister terminates the investigation or on the day an order or finding is made by the Canadian International Trade Tribunal. The Tribunal is required by law to make an order or finding within a period of 120 days from the date of receipt of a notice of a preliminary determination of dumping or subsidizing. However, under special circumstances (see paragraphs 32 to 38 of this Memorandum) the provisional period will extend beyond the usual 120 day period.

4. The importer of goods imported during the provisional period shall, at the time of accounting of the goods:

(a) pay the determined amount of provisional duty in cash or by certified cheque; or

(b) post security sufficient to cover the determined amount of provisional duty payable. Whenever possible, security should be posted prior to an importation during the provisional period. However, security is acceptable for retroactive application to

goods for which provisional duty was either not demanded, demanded but not paid, or already paid. Where provisional duty already paid is returned at the request of an importer following the posting of security, no interest will be paid thereon.

5. The method of payment of provisional duty with respect to any one importation may not be a combination of cash payment and posting of security.

6. The determination of provisional duty is not appealable.

7. The public is informed of anti-dumping and countervailing actions through publication of notices in the Canada Gazette.

8. For assistance in properly completing accounting documents regarding provisional duty, importers and brokers should consult Memorandum D14-1-2, Disclosure of Normal Value and Export Price Established under the Special Import Measures Act to Importers, and Memorandum D14-1-4, Exchange Rate for Calculations under the Special Import Measures Act and Regulations.

9. Importers/brokers are reminded that form B 3, Canada Customs Coding Form, must be coded with the SIMA codes and the other SIMA fields completed. Refer to Memorandum D17-1-10, Coding of Customs Accounting Documents, for the code listings.

RELEASE OF GOODS

10. Where an importer or broker normally has goods released prior to payment of duties, according to subsections 32(1) and (2) of the Customs Act, goods subject to provisional duties may also be released in the same manner under the same conditions. Consult Memorandum D17-1-5, Release of Imported Goods, concerning release on minimum documentation.

11. Where an importer does not ordinarily have goods released in the manner outlined in paragraph 10 of this Memorandum, goods subject to provisional duty will not be released from Customs unless the determined amount of provisional duty is paid or security is posted. In instances where security is posted, the goods shall not be released until the value of the security has been verified to be sufficient to cover the amount of provisional duty applicable to the goods.

12. After release, the Customs inspector is to forward to the SIMA Regional Liaison Officer (SRLO) a copy of the release documents.

13. The SRLO is responsible for distributing the Index of Goods Subject to the Special Import Measures Act, which includes those subject to provisional duty, and related enforcement instructions to offices and release stations and ultimately to Customs inspectors. Headquarters is responsible for maintaining importer and commodity profiles in the Release Support System.

POSTING OF SECURITY

14. Security must be in the form of bonds issued by a financial institution or acceptable bonding company, which is approved by the Government of Canada (see Memorandum D1-7-1, Posting Security for Transacting Bonded Operations), and in the form set out in the Appendix to this Memorandum.

15. A bond must be signed by the Principal and be impressed with the corporate seal. Where the Principal's corporate seal is witnessed by an authorized official other than as set out in the Appendix to this Memorandum, the bond must be accompanied by a by-law or other evidence that the witness has authority to so bind the company.

16. A bond must also be signed by the Surety and be impressed with its corporate seal. Where the Surety's corporate seal is witnessed by a duly authorized official designated by a power of attorney, a copy of the power of attorney shall be provided upon request.

17. A bond must be filed during official business hours, with the Regional Financial Services Manager of the region having jurisdiction over the point of release of the goods. The Regional Financial Services Manager will then be responsible for the physical safekeeping of the bond. Where an importer imports through more than one region, a separate bond must be filed in each regional Customs office.

18. When the bond is received at the regional Customs office, the importer and/or broker should be made aware that:

(a) the bond will be held in excess of 120 days from the date of the preliminary determination of dumping or subsidizing in cases where the Tribunal makes an injury finding or under the special circumstances as outlined in paragraphs 32 to 38 of this Memorandum. Following the issuance of a designated officer's determination pursuant to section 55 of the Special Import Measures Act and when the payment of anti-dumping duty or countervailing duty owing has been made, the bond will be returned to the Surety; and

(b) provisional duty must be included on each accounting document relating to the subject goods along with the applicable bond number.

19. When the bond is received, the Regional Financial Services Manager will forward a photocopy of the bond to the SRLO who is responsible for the accounting control and monitoring of the bond.

20. The SRLO is responsible for advising all offices, release stations and Information Services, Anti-dumping and Countervailing Division, Headquarters, of the name and address of the importer and the broker, the bond number, the amount of the bond, the effective date of the preliminary determination of dumping or

subsidizing, the effective date of the bond and the product description of the subject goods.

CONTROL OF SECURITY

21. The regional Financial Services Manager shall maintain a registry of the provisional duty bonds recording the relevant details of each bond, including the bond number and the final disposition of the bond.

22. The SRLO responsible for monitoring the security amounts, should maintain a record for the bond which indicates the decreasing balance of the bond on an importation by importation basis. The form or type of record used may vary from region to region.

23. When 80 per cent of the value of the security posted has been accounted for by provisional duty, the SRLO shall request the importer or broker to re-evaluate the security requirements and submit additional security, if required.

CONTROL OF ACCOUNTING DOCUMENTS

24. The SRLO shall be responsible for forwarding a copy of each relevant accounting document to Information Services, Anti-dumping and Countervailing Division, on an importation by importation basis.

25. If, prior to the rendering of the final Tribunal decision concerning injury, it is discovered that an accounting document does not include the provisional duty which is properly due and the importation is covered by a bond, a "non-revenue" Detailed Adjustment Statement (DAS), form B 2-1, shall be used to inform Headquarters, the importer and/or broker, and the SRLO who will adjust the remaining balance of the security accordingly. A "non-revenue" DAS issued for this purpose is not to be recorded in Accounts Receivable.

PROCEDURES AFTER A TRIBUNAL FINDING

26. Notice of the Tribunal's finding is to be communicated immediately to the Customs Assessment Division (CAD) Manager, to the attention of the SRLO.

27. If a finding of past injury is made by the Tribunal, security posted in respect of provisional duty will be held until the liability for provisional duty has been discharged. However, under no circumstances is the bond to be used to cover goods released after the date of the Tribunal's decision.

28. In the event that the Tribunal finds past injury has occurred, Headquarters will issue a DAS form B 2-1 representing the

assessment resulting from a designated officer's determination. A letter may also be mailed to the importer explaining the assessment(s) in more detail.

RETURN OF BOND AND REFUNDS

29. Security posted to cover provisional duty payable will be returned to the Surety either for the reason that the Deputy Minister has terminated the investigation, or that the Tribunal has found that injury has not occurred as a result of the dumping or subsidizing, or for the reason that the anti-dumping or countervailing duty has been paid. The financial institutions or bonding companies, as the case may be, will be notified by registered mail by the Regional Collector that their liability is being terminated.

30. For audit and other internal requirements, one photocopy of the bond shall be maintained at the appropriate Customs office for a period of three years.

31. Where the provisional duty is paid by cash or certified cheque and a refund is due to the importer, the refund will include the amount of provisional duty refundable plus interest on the amount to be returned, calculated for the period between the time duty was paid and the time it is returned. See Memorandum D17-1-19, Interest Rate for Customs Purposes Regulations, for additional information on the calculation of interest.

SPECIAL CIRCUMSTANCES

Binational Panel Review of a Tribunal Finding Respecting Goods of a NAFTA Country

32. When a finding (definitive decision) of the Tribunal is referred back to the Tribunal by a binational panel, review by the Tribunal of its original finding is mandatory under subsection 76(2.2) of the Act. The Tribunal, within the time frame specified by the panel, must complete its reconsideration of the matter and, in accordance with the terms of subsection 76(4.1) of the Act, either confirm its original finding, or rescind it and make a new finding. For binational panel proceedings to be invoked, the initial Tribunal finding must relate to goods of a NAFTA country.

33. The referral back by a binational panel of a no injury finding made under the Special Import Measures Act, subsection 43(1), results in the imposition of provisional duties pursuant to subsection 8(1.1) of the Act. Provisional duties become applicable retroactive to the date of the Deputy Minister's preliminary determination and continue until the date the Tribunal confirms its original finding of no injury or makes a new finding. If the Tribunal confirms its original finding, proceedings are terminated in accordance with section 47 of the Act.

34. Where provisional duty has been paid or security posted pursuant to subsection 8(1.1) of the Special Import Measures Act a total refund of the provisional duty paid, or return of the bond posted as security, will be effected where the Tribunal, on reconsideration of its original no injury finding following a remand of the decision by a binational dispute settlement panel:

(a) confirms that no injury was caused or would have been caused by the dumping or subsidizing in question; or

(b) finds that injury would have been caused only by future importations of the dumped or subsidized goods.

35. In such cases, provisional duty paid or security posted as a result of the referral back is returned to the importer, with interest being paid on refunds as provided for in subsections 8(2) to (4) of the Act. If the Tribunal makes a new finding, duty must be refunded or collected in accordance with the new finding and the relevant provisions of the Act, namely sections 3 to 6, subsections 8(2) to (4) and section 55.

Federal Court Review of a Tribunal Finding

36. Where a finding of the Tribunal is set aside or set aside and referred back following an application under section 96.1 of the Special Import Measures Act or pursuant to the provisions of the Federal Court Act, section 44 of the Special Import Measures Act requires that the inquiry be recommenced by the Tribunal. Should a finding be set aside but not referred back, the Tribunal is authorized to decide, within 30 days, whether or not to recommence its inquiry. Where the Tribunal recommences its inquiry as the result of a referral back, it must make a new finding no later than 120 days after the date on which the original finding was set aside. Where the inquiry is recommenced by the Tribunal on its own initiative, it must make a new finding no later than 120 days after the date on which it decided to recommence its inquiry.

37. Where the Tribunal finding set aside, or set aside and referred back is one of no injury, made under the Special Import Measures Act, subsection 43(1), the conditions for applying subsection 8(1) to impose provisional duty are met. This is because provisional duty is levied during the period commencing on the day a preliminary determination is made and ending on the date of the Tribunal finding. Since the court has set aside the finding, the effect is the same as though the finding never existed, and proceedings revert to the provisional period. The Department must, therefore, reimpose provisional duties for the period commencing on the date of the Deputy Minister's preliminary determination and ending on the date that the Tribunal confirms its original finding of no injury or makes a different finding.

38. When the Tribunal has made its new finding, duty is refunded

or collected in accordance with the new finding and the relevant provisions of the Act, namely sections 3 to 6, subsection 8(2) and section 55. This can include the retroactive application of duties to goods for which no duty was collected at the time of importation.

ADDITIONAL INFORMATION

39. Questions regarding importations subject to the special circumstances outlined above should be directed to the:

Director General
Anti-dumping and Countervailing Division
Revenue Canada
Customs, Excise and Taxation
19th Floor
Sir Richard Scott Building
191 Laurier Avenue West
Ottawa, Ontario
K1A 0L5

Facsimile: 613 954-2510

APPENDIX

BOND TO SECURE PAYMENT OF PROVISIONAL DUTY UNDER THE SPECIAL IMPORT MEASURES ACT

No. . Amount \$.

KNOW ALL MEN BY THESE PRESENTS: that we, .
of . in the Province of .
hereinafter called the "Principal", and .

.
hereinafter called the "Surety", are jointly and severally bound unto our Sovereign Lady the Queen, her heirs and successors, as represented by the Minister of National Revenue of Canada, hereinafter called the "Obligee", in the penal sum of . Dollars of the lawful money of Canada, to be paid to the said Obligee, for which payments well and faithfully to be made, we jointly and severally bind ourselves and our respective heirs, executors, administrators, successors and assigns firmly by these presents, sealed with our respective seals and dated the . day of . in the year one thousand nine hundred and .

Whereas the Principal is required to pay provisional duty on (describe the goods) released from Customs on and after (set out the date of the preliminary determination) at the Customs office(s) of (set out the name of the Customs office(s)), and, wishing to delay the payment of such duty, is required to deposit security for the purpose of securing the payment of all provisional duty on the said goods released from Customs on and after (set out the date of the preliminary determination).

Now the condition of the above written obligation is such that, if

the Principal shall pay all the provisional duties payable under the Special Import Measures Act on the said goods, and shall well and truly perform and fulfill the obligations imposed on the said Principal by the Special Import Measures Act, then this obligation shall be void and of no effect, but otherwise shall be and remain in full force, virtue and effect.

Notice of any claim hereunder shall be given to the Surety by registered mail or by personal service within one year of the last day on which provisional duties are imposed on the said goods under the Special Import Measures Act.

IN WITNESS WHEREOF the Principal has hereunto set his hand and seal (if the Principal is an individual) or has caused these presents to be sealed with its corporate seal, attested to by the signatures of its duly authorized officials (if the principal is a corporation), and the Surety has caused these presents to be sealed with its corporate seal, attested to by the signature of its duly authorized official(s), the day and year first above written.

Signed, sealed in the presence of:

1. .1. .Seal

Witness to individual's signature Principal (individual)

OR

Principal's corporate seal (Company)

.
President (or other authorized official of principal)
Secretary (or other authorized official of principal)

2. Surety's corporate seal

.
Duly Authorized Official (title)

REFERENCES

Anti-dumping and Countervailing Division

Special Import Measures Act

4320-1

D14-1-5, August 6, 1993

D1-7-1, D14-1-2, D14-1-4, D17-1-5, D17-1-10, D17-1-19