CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, January 28, 1994

PB-93-001

PREFORMED FIBREGLASS PIPE INSULATION WITH A VAPOUR BARRIER, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

TRIBUNAL'S CONSIDERATION OF THE PUBLIC INTEREST QUESTION

BACKGROUND

On November 19, 1993, pursuant to subsection 43(1) of the *Special Import Measures Act*[1] (SIMA), the Canadian International Trade Tribunal (the Tribunal) found that the dumping in Canada of preformed fibreglass pipe insulation with a vapour barrier, originating in or exported from the United States of America, had caused, was causing and was likely to cause material injury to the production in Canada of like goods.

During the course of the inquiry which led to the finding of material injury, several parties expressed an interest in making representations concerning the public interest pursuant to section 45 of SIMA. On September 29, 1993, the Tribunal informed counsel and parties that they would be given the opportunity to make such representations if the Tribunal were to make a finding of material injury. On November 24, 1993, the Tribunal invited interested persons to make written representations to the Tribunal on or before December 20, 1993, concerning the public interest. Persons wishing to respond to these representations were directed to do so on or before January 7, 1994. The Tribunal advised that, following consideration of the representations, it would take a view as to whether the representations demonstrated that there was a public interest issue worthy of further investigation.

Six parties made representations to the Tribunal concerning the above matter.

Counsel for the Director of Investigation and Research, *Competition Act* (the Director), submitted that the imposition of anti-dumping duties at or near the full margin of dumping would curtail effective import competition, would confer a benefit to Manson Insulation Inc. (Manson) beyond the elimination of material injury and would likely reduce economic welfare in Canada. He also contended that anti-dumping duties at or near the full margin of dumping could lead Manson to expand its productive capacity to supply more, and possibly all, of the domestic market. In counsel's submission, any anti-dumping duties imposed should not be set at a level that could distort the incentives for investment in productive capacity.

Counsel for Owens-Corning Fibreglas Corporation (Owens-Corning) and Owens-Corning Fibreglas Canada Inc. (Fibreglas) maintained that the imposition of anti-dumping duties in the full amount would result in protection far in excess of any injury caused to Manson and result in unwarranted costs to the Canadian economy in general and the construction sector in particular. According to counsel, this situation could have an adverse impact on competition in the market for the subject goods in Canada as well as for other related products, some of which are produced by Fibreglas at its Canadian plants.

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

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Moreover, the imposition of anti-dumping duties in a punitive manner could discourage rationalizations of the type carried out by Owens-Corning and Fibreglas, and which have benefited Canada. Counsel for Fibreglas contended that normal values for the subject goods should not exceed the non-injurious undertaking prices agreed to by parties on June 18, 1993. Further, counsel submitted that no normal values should be imposed, or anti-dumping duties collected, on pipe sizes not manufactured by the Canadian producer or on pipe sizes Manson imports now, or at any time in the future, from the United States or any third country.

The Master Insulators' Association of Ontario Inc. submitted that the imposition of the anti-dumping duties in the full amount would eliminate competition in the marketplace. The resulting monopoly would enable Manson to choose those contractors to whom it will sell at competitive prices and, thus, to decide which contractors and distributors will remain in the industry.

Burnaby Insulation Supplies Ltd. (Burnaby) submitted that the anti-dumping duties would create a monopoly for their competitor, Crossroads C&I (Crossroads), a Manson-associated company. Its selling prices would preclude Burnaby's ability to compete in the marketplace. Burnaby's customers, which are insulation contractors, would have no choice of suppliers. In order to remain competitive, Burnaby argued, these contractors would have to purchase their preformed fibreglass pipe insulation requirements from Crossroads. Burnaby also questioned why anti-dumping duties are applied to sizes of preformed fibreglass pipe insulation that Manson cannot or does not manufacture.

Glass-Cell Fabricators Ltd. stated that the imposition of anti-dumping duties was not in the public interest.

Counsel for Manson contended that it is not rational to think that Manson, with its limited capacity, would price its goods much differently from the landed cost of U.S. goods and that there was no discernible public interest which would call for intervention by way of a section 45 recommendation to hold the prices lower. Counsel argued that the goods pay for themselves at "normal prices" through energy conservation and that the initial capital cost of the goods was minuscule in relation to the cost of the buildings in which they are used.

In reply to the representations of other parties, counsel for Manson stated that the Director's "welfare economics" methodology would produce the same recommendation in virtually all anti-dumping or countervailing duty cases and that accepting this argument would vitiate the anti-dumping system. In relation to competition concerns, counsel noted that the Director has the means to address this issue under his own legislation.

With regard to the allegation that the price undertakings negotiated in June 1993 would result in prices high enough to remove any injury being suffered by Manson, counsel argued that these prices were negotiated prior to the Tribunal's injury inquiry. According to counsel for Manson, a complainant has an incentive to balance the certainty of protection offered by price undertakings against the uncertainty of a finding of material injury resulting from a Tribunal inquiry and the cost of the inquiry process. Therefore, a complainant may be willing to accept prices that would remove less than the

full amount of injury in order to ensure protection and avoid the costs associated with a Tribunal inquiry. Counsel also submitted that the full amount of anti-dumping duties is not yet known and will not be known until the Department of National Revenue (Revenue Canada) completes its determinations pursuant to section 55 of SIMA.

PUBLIC INTEREST CONSIDERATIONS

Subsection 45(1) of SIMA provides that where, after making a finding of material injury, the Tribunal is of the opinion that the imposition of anti-dumping duties, in whole or in part, would not or might not be in the public interest, it shall report its opinion to the Minister of Finance with a statement of the facts and reasons that caused it to be of that opinion.

The Tribunal is of the view that SIMA, in its entirety, was enacted by Parliament in the public interest. The primary object of SIMA is to protect Canadian producers from injury caused by dumped or subsidized imports. In an anti-dumping case, where the Tribunal finds material injury under section 43 of SIMA, pursuant to section 3 of SIMA, an anti-dumping duty in an amount equal to the margin of dumping must be imposed on imports of dumped goods to which the finding applies. The Tribunal is without jurisdiction to order that duties in less that the full amount be imposed. Under subsection 45(1) of SIMA, the Tribunal shall report to the Minister of Finance if it is of the opinion that the imposition of an anti-dumping duty in whole or in part would not, or might not, be in the public interest. To come to such an "opinion," the Tribunal must first be satisfied, on the particular facts of the case, that there is a sufficiently compelling public interest issue to warrant a departure from the primary object of SIMA.

In considering the public interest question, the Tribunal has reviewed carefully the representations summarized above, as well as the evidence and testimony adduced during the section 42 inquiry. The Tribunal is of the view that, if there is a public interest issue in this case, it would relate to the allegation that the imposition of anti-dumping duties may curtail effective price competition in the domestic market for the subject goods.

In this regard, the Tribunal notes that Manson is the sole producer of preformed fibreglass pipe insulation with a vapour barrier in Canada, that there are no close substitutes for the subject goods, that there is little likelihood of competition from the subject goods produced in countries other than the United States, and that the price of the subject goods from the United States will rise with the imposition of the anti-dumping duties.

Thus, Manson's only competition in the Canadian domestic market is from imports of the subject goods from the United States. In this regard, the Tribunal is of the view that the imposition of the full amount of the anti-dumping duties would not exclude the U.S. subject goods from the Canadian market nor interfere with effective price competition between the subject goods made in the United States and like goods made in Canada.

The evidence available to the Tribunal indicates that Manson is not able to supply the entire domestic market for preformed fibreglass pipe insulation with a vapour barrier. The firm's plant capacity is constrained by plant equipment limits and by raw-material supply. Because anti-dumping duties, generally speaking, are in place for five years unless there is a review and an order to continue the finding, the Tribunal does not consider it likely that the anti-dumping duties will encourage Manson to invest in plant

and equipment so as to serve the entire domestic market. In light of these circumstances, the Tribunal is of the view that the subject goods imported from the United States will continue to compete in the domestic marketplace.

Moreover, in these circumstances, the Tribunal anticipates that Manson will respond to the imposition of the anti-dumping duties by raising its prices. It is reasonable to expect that these prices will not rise above the applicable normal values (which generally reflect U.S. market prices), plus applicable customs duties and transportation costs.

Thus, the Tribunal finds it reasonable to believe that the subject goods imported from the United States will continue to compete in the Canadian domestic marketplace. However, the price points around which that competition will take place will likely rise from those of the dumped prices to those of the normal values of the U.S. preformed fibreglass pipe insulation with a vapour barrier sold in the U.S. domestic market, plus any applicable customs duties and transportation costs. Effective price competition, therefore, should continue in Canada between the like goods made in Canada and the subject goods made in the United States, albeit at a higher price level.

In this respect, it is useful to reflect on the price levels represented by the normal values established by Revenue Canada. Thus far in this case, Revenue Canada has determined normal values on the basis of the U.S. domestic prices for like goods or, with respect to some product sizes sold by certain exporters, on the basis of U.S. production costs plus amounts for expenses and profits. The anti-dumping duties will be assessed only to the extent necessary to compensate for dumping margins on specific shipments.

The Tribunal has carefully considered the other arguments advanced in favour of it forming an opinion under subsection 45(1) of SIMA.

The Director contended that the imposition of anti-dumping duties in the full amount in this case would likely reduce economic welfare in Canada. It is true, in this case, that the imposition of anti-dumping duties in the full amount is likely to cause prices for preformed fibreglass pipe insulation with a vapour barrier to rise. However, that is a natural consequence of the regulatory scheme established by Parliament under SIMA. The economic welfare argument would lead to the conclusion that it is in the public interest not to apply anti-dumping duties in the full amount in virtually every case that comes before the Tribunal. This conclusion would conflict with the public-policy purpose that Parliament recognized in providing protection against injury caused by dumping to Canadian industry.

It is also argued that, by raising prices in the domestic marketplace, the imposition of anti-dumping duties would give Manson a more dominant position in the market and possibly enable it to abuse that position. For instance, it is alleged that Manson may practice price discrimination between contractors or otherwise favour certain contractors over others. The Tribunal cannot forecast with certainty what precise events may unfold in the marketplace. If any anti-competitive activities should materialize, however, the Tribunal is of the view that the proper authority to address them is the Director, under the *Competition Act*.[2]

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2. R.S.C. 1985, c. C-34.

Some parties argued that duties should be imposed only to the extent that is necessary to remove the injury to Manson. The Tribunal takes a similar view regarding this generic argument as it did regarding the Director's economic welfare argument. Specifically, in SIMA, Parliament has established a statutory scheme whereby, upon a finding of material injury, duties are imposed on imports of dumped goods in an amount equal to the full margin of dumping. Under subsection 45(1) of SIMA, the Tribunal shall report to the Minister of Finance if it is of the opinion that the imposition of an anti-dumping duty, or the imposition of such a duty in the full amount, would not or might not be in the public interest. The Tribunal shall make a report if it is satisfied that there is a sufficiently compelling public interest issue to warrant a departure from the primary object of SIMA. The Minister of Finance may use the Tribunal's report in such manner as he considers appropriate.

Finally, some parties submitted that, because Manson does not produce certain sizes of preformed fibreglass pipe insulation with a vapour barrier, the anti-dumping duty on those sizes should be reduced to zero. This submission, in effect, amounts to a request for an exclusion from the finding of material injury for the pipe insulation sizes in question. The Tribunal is of the view that section 45 of SIMA is not the appropriate provision under which to request an exclusion from a finding made under section 43 of SIMA. Such arguments are more properly made during an inquiry conducted pursuant to section 42. Section 43 expressly provides the Tribunal with the power to declare to what goods its order or finding applies. The Tribunal has used that power from time to time to exclude certain products, producers and countries from the effects of its orders and findings, but did not receive any requests to exclude specific sizes of pipe insulation during the section 42 inquiry. In the Tribunal's view, requests for exclusion are not properly part of a consideration pursuant to section 45.

For the above reasons, the Tribunal is not convinced that there is a public interest issue worthy of further investigation under section 45 of SIMA. As a consequence, no report will be issued to the Minister of Finance.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Desmond Hallissey
Desmond Hallissey
Member