CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, June 30, 1999

Inquiry No.: NQ-99-001

IN THE MATTER OF a motion brought by Francosteel Canada Inc. and Sollac, Aciers d'Usinor for an order terminating Inquiry No. NQ-99-001 with respect to certain cold-rolled steel sheet products originating in or exported from Spain;

AND IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* with respect to certain cold-rolled steel sheet products originating in or exported from Argentina, Belgium, New Zealand, the Russian Federation, the Slovak Republic, Spain and Turkey.

DECISION OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby denies the motion for an order terminating Inquiry No. NQ-99-001 with respect to the above-mentioned goods originating in or exported from Spain, which notice of motion also suggested that the Canadian International Trade Tribunal extend such an order to the goods originating in or exported from New Zealand on the same ground.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's decision will be issued at a later date.

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 15, 1999

Inquiry No.: NQ-99-001

IN THE MATTER OF a motion brought by Francosteel Canada Inc. and Sollac, Aciers d'Usinor for an order terminating Inquiry No. NQ-99-001 with respect to certain cold-rolled steel sheet products originating in or exported from Spain;

AND IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* with respect to certain cold-rolled steel sheet products originating in or exported from Argentina, Belgium, New Zealand, the Russian Federation, the Slovak Republic, Spain and Turkey.

STATEMENT OF REASONS

BACKGROUND

On June 24, 1999, counsel for Francosteel Canada Inc. (Francosteel) and for Sollac, Aciers d'Usinor (Sollac) filed with the Tribunal a motion for an order terminating the inquiry with respect to certain cold-rolled steel sheet products, originating in or exported from Spain, on the ground of negligible volume of imports from this country, based on data contained in the Tribunal's Pre-Hearing Staff Report (Staff Report) dated June 21, 1999.

On June 24, 1999, counsel for BHP New Zealand Steel Limited (BHP New Zealand) supported the motion and asked that the inquiry also be terminated in respect of New Zealand on the same ground.

On June 25, 1999, the Tribunal received a joint preliminary position from counsel for Stelco Inc. (Stelco), on behalf of the latter, Dofasco Inc. (Dofasco) and Ispat Sidbec Inc. (Sidbec), concluding, among other things, that the motion is "pre-emptory" and that the parties are seeking directions from the Tribunal.

Also on June 25, 1999, counsel for Siderar S.A.I.C. (Siderar), the Argentinean producer of the subject goods, filed a response to the motion concluding that it should be denied as being premature and unfounded.

On that same day, considering the preliminary position taken by some parties to this inquiry and the fact that some had asked for Tribunal directions as to the motion, the Tribunal informed the parties that, as a result of the above and pursuant to Rules 5 and 24 of the *Canadian International Trade Tribunal Rules*, other parties to this inquiry who wanted to comment on the motion had to file their comments with the Secretary of the Tribunal by Tuesday, June 29, 1999. The Tribunal also informed the parties that, should it be necessary, further directions would be provided to all parties forthwith thereafter. On June 30, 1999, the Tribunal issued a decision denying the motion.

ISSUE BEFORE THE TRIBUNAL

The issue brought by this motion is whether the Tribunal should allow the motion and immediately terminate the inquiry with respect to Spain as well as New Zealand, based on their alleged negligible volume

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of imports, pursuant to subsection 42(3) of the *Special Import Measures Act*[1] (SIMA), or whether the motion is premature.

POSITION OF THE PARTIES

In his written submissions in support of the motion, counsel for Francosteel and Sollac argued, among other things, that since the volume of imported subject goods from Spain has been determined by the Tribunal in the Staff Report to be negligible, the Tribunal should immediately issue an order terminating its injury inquiry insofar as it relates to those goods. Counsel based his arguments on the definition of the word "negligible" contained in subsection 2(1) of SIMA, which he said, was added as a result of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*[2] (Anti-dumping Agreement), especially its Article 5:8. As only two of the subject countries, namely Spain and New Zealand, have volumes of dumped goods below 3 percent, that is 2.2 percent and 1.9 percent, respectively, the exception to a determination of negligibility contained therein does not apply.

The consequence, counsel for Francosteel and Sollac contended, is that the Tribunal must forthwith issue an order terminating its injury inquiry with respect to a country whose volume of dumped goods is negligible. Counsel argued in this regard that Article 5:8 of the Anti-Dumping Agreement provides that there shall be an immediate termination of the investigation regarding any such country, that the said provision has been brought into Canadian law by subsection 42(3) of SIMA, that it is reasonable for the Tribunal to make reference to the GATT (now the WTO Agreement) for the purpose of interpreting SIMA when the act is unclear or ambiguous and, consequently, that it is appropriate and advisable for the Tribunal to construe subsection 42(3) of SIMA in light of Article 5:8 of the Anti-Dumping Agreement. In addition, counsel referred to subsection 35(1) of SIMA, which provides that the Deputy Minister should terminate an investigation if he is satisfied that the volume of dumped goods from a subject country is negligible, and argued that the Tribunal can do likewise, based on its decision in *Stainless Steel Round Bar*[3].

Counsel for Francosteel and Sollac also argued for the necessity of an expedited decision, in the interest of justice, so that the exporters and importers of subject goods from Spain not be put to the expense and difficulty of preparing or presenting their case before the Tribunal, or of contesting the complaints' case when the volume of subject goods from Spain is negligible. Counsel stressed that such a decision would expedite the Tribunal's hearing on the issue of injury caused by the remaining dumped goods. Also in the interest of justice, counsel added that an order terminating the inquiry with respect to Spain should equally apply to New Zealand.

As noted earlier, counsel for BHP New Zealand supported the motion, essentially for the same reasons contained in the written submissions made by counsel for Francosteel and Sollac. Counsel for BHP New Zealand, however added, among other things, that the "conferral of negligible status" upon New Zealand and Spain is consistent with Canadian policy on trade relations and trade liberalization.

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1. R.S.C. 1985, c. S-15.
2. Signed at Marrakech on April 15, 1994.
3. *Stainless Steel Round Bar of Sizes 25 mm Diameter up to 570 mm Diameter Inclusive, Originating in or Exported from the Federal Republic of Germany, France, India, Italy, Japan, Spain, Sweden, Taiwan and the United Kingdom, Statement of Reasons* (September 21, 1998) NQ-98-001 (C.I.T.T.) at 10-14.

In his joint preliminary comments filed on behalf of Stelco, Dofasco and Sidbec, the domestic industry in this case, counsel for Stelco noted that the motion asked the Tribunal to rule on the matter of negligibility before the Tribunal has completed its full injury inquiry and before the Deputy Minister has rendered his final determination of dumping. Counsel added that the motion is "pre-emptory" as, at the time of its filing, the parties to the inquiry just recently had been served with the Tribunal's exhibits, including the Staff Report, for purposes of review and analysis, and the Tribunal was yet to receive the "Manufacturer's/Producer's case" from the domestic industry as of June 29, 1999. Counsel argued in this regard that the Tribunal and all parties to the inquiry will have sufficient opportunity to adduce further evidence and make representations on the issues raised in the motion at the hearing. Furthermore, it has been the Tribunal's practice to render its decision on whether a particular country ought to be excluded at the conclusion of its inquiry, that is, after all relevant evidence and submissions are before the Tribunal. According to counsel, the remedy sought in the motion would nullify and render inapplicable the statutory scheme of section 41 of SIMA which provides for a consideration of negligibility at the time of the Deputy Minister's final determination.

Counsel for Siderar noted that the motion is premature and unfounded since there is insufficient reliable data on the record to enable the Tribunal to make a decision. Stressing that imports from Argentina are negligible as per the Deputy Minister's preliminary determination, counsel indicated, however, that the latter could not terminate the inquiry on the basis of negligibility because countries with negligible imports, including Argentina, had imports that, in the aggregate, barely exceeded seven per cent of total imports. Nevertheless, counsel added, that is not to say that the Deputy Minister nor the Tribunal cannot come to a different conclusion. Nevertheless, because the supply and accumulation of information is ongoing, it would be improper for the Tribunal, in his view, to make a decision on such important matters in the absence of a full data base. Counsel also noted in this regard that it is an open issue as to which period should be considered for purposes of negligibility and that a more appropriate period could be designated by the Deputy Minister for his final determination or by the Tribunal in the presence of the full data base.

DECISION

The issue brought by this motion raises two important questions, one factual, with respect to the data on which the said motion is based, the second legal, with respect to the proper interpretation to be given to subsection 42(3) of SIMA.

With respect to the facts on which the motion is based, the Tribunal notes that the motion refers to data contained in the Staff Report. A staff report constitutes an essential tool and an integral component in a Tribunal's inquiry or review under SIMA. However, the Tribunal notes that these reports are pre-hearing reports prepared by Tribunal staff and that the data they contain are usually subject to the scrutiny of participants to the inquiry up to, and including, the hearing. Furthermore, it is not uncommon to see the data contained in these reports being updated until the day of the hearing, as a result of the Tribunal receiving late responses to questionnaires, revisions being made to responses already submitted or further to the staff's own internal audit and review process. Contrary to the submissions made by counsel for Francosteel and Sollac[4], there has been no determination yet as to the negligibility of imports of subject goods from Spain, nor could there be one since all we are dealing with here is a report prepared by the Tribunal's staff, not a Tribunal's decision or determination. In fact, even if data for Spain, and for New Zealand for that matter, remained the same, those for Argentina could change. Thus it could be prejudicial to some of the participants

4. *Written Submissions in Support of the Motion*, para 1.

to this inquiry if the motion was to be granted prior to completion of the hearing. To make this finding now could, for example, preclude the application of the "seven per cent exception"[5] provided in the definition of the word "negligible" in section 2 of SIMA, should the data eventually show Argentina to be moving below the 3 percent level. For the above reasons alone, the motion would appear to be premature.

Regarding the legal question, the Tribunal notes that the question of negligibility at the Tribunal's injury inquiry stage only arises for the purpose of subsection 42(3) of SIMA, that is in the context of its assessment whether to cumulate the effects of dumped or subsidized imports.

Subsection 42(3) reads as follows:

> (3) In making or resuming its inquiry under subsection (1), the Tribunal may make an assessment of the cumulative effect of the dumping or subsidizing of goods to which the preliminary determination applies that are imported into Canada from more than one country if
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> *(a)* the margin of dumping or the amount of the subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible; and
>
> *(b)* an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the preliminary determination applies that are imported into Canada from any of those countries and
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> (i) goods to which the preliminary determination applies that are imported into Canada from any other of those countries, or
>
> (ii) like goods of domestic producers.

In fact, subsection 42(3) allows the Tribunal to make an assessment of the cumulative effect of the dumping of goods from more than one country, provided certain conditions are met. Among these conditions are those in paragraph 42(3)*(a)* which provide that the margin of dumping must not be insignificant and, the point at issue, that the volume of goods from each of those countries must not be negligible. Moreover, paragraph 42(3)*(b)* imposes another condition which deals with the existence of conditions of competition between the subject goods themselves and between the subject goods and the like goods.

Subsection 42(3) is completely silent as to the Tribunal's ability to terminate an inquiry with respect to a country whose volume of dumped goods is negligible (as opposed to subsections 35(1) and 41(1) of SIMA, in the case of the Deputy Minister's preliminary and final determinations).

In the Tribunal's view, subsection 42(3) does not direct the Tribunal to terminate an inquiry because of negligibility. The Tribunal recalls in this regard that in *Refined Sugar*[6], the "negligible" volume of dumped Korean goods did not form part of the Tribunal's cumulative assessment regarding the other subject

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5. Based on paragraph (b) of that definition, where the total volume of dumped goods of three or more countries (each of whose exports of dumped goods is less than three per cent of the total volume of goods and would otherwise be negligible) is more than seven per cent of the total volume of such goods, the volume of dumped goods of any of those countries is not negligible.
6. *The Dumping in Canada of Refined Sugar Originating in or Exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom and the Republic of Korea, And the Subsidising of Refined Sugar Originating in or Exported from the European Union, Finding* (November 6, 1995), *Statement of Reasons* (November 21, 1995), NQ-95-002 (C.I.T.T).

countries, but was subject to a distinct injury analysis[7]. The Tribunal concluded at the end that there was no injury with respect to the Republic of Korea.

The Tribunal disagrees that there is an ambiguity in SIMA with respect to negligibility. It is clear, in reading subsections 35(1) and 41(1) of SIMA, that the Deputy Minister was granted the authority and duty to terminate an investigation should there be "negligible" volume of dumped or subsidized goods for a given country, in accordance with Article 5:8 of the Anti-dumping Agreement. It is also clear, in reading subsection 42(3) of SIMA, that the Tribunal was given the discretion to cumulatively assess the effects of dumped or subsidized imports depending upon the conditions referenced to earlier, including negligibility, in accordance with Article 3:3 of the Anti-dumping Agreement.

While obviously there is some relationship between Articles 3:3 and 5:8 of the Anti-Dumping Agreement and subsections 35(1), 41(1) and 42(3) of SIMA, as they all refer to negligibility, this does not mean that the Tribunal can infer that the remedy in subsections 35(1) and 41(1) applies to its injury inquiry and that the Tribunal was given the authority to terminate an investigation at this stage of its inquiry. The Tribunal agrees that SIMA must be interpreted in the context of the relevant trade agreements, but where there is no ambiguity in the law and where the Government has been clear as to how it interpreted its international obligations, the Tribunal has no choice but to apply the provisions of SIMA as they are.

The Tribunal here notes that its interpretation as to the meaning of subsections 35(1), 41(1) and 42(3) of SIMA is supported by the *Canadian Statement on Implementation*[8] of the WTO, in which the Government of Canada set out its general interpretation of the rights and obligations contained in the WTO Agreements. Referring to changes made to sections 35 and 41 of SIMA (which, as noted, only apply to the Deputy Minister's investigations), the Government stated that an investigation may be terminated in respect of goods from a country where the volume of dumped goods is negligible[9]. But commenting on modifications in section 42, the Government said nothing to that effect with respect to the Tribunal, and simply stated that the specific authority to cumulatively assess the effects of dumped goods had been added to section 42 of SIMA[10].

In fact, the statutory scheme by which Articles 3:3 and 5:8 of the Anti-Dumping Agreement were implemented into SIMA not only shows the above-noted distinctions between the powers of the Deputy Minister and those belonging to the Tribunal, but it reveals also some noted discrepancies as to the data that the Tribunal can consider in its decision regarding cumulation and negligibility, as opposed to those on which the Deputy Minister can rely. As noted by the Tribunal in *Stainless Steel Round Bar*, clauses 35(1)*(a)*(iii) and 41(1)*(a)*(ii.1) of SIMA provide that the Deputy Minister can consider the "actual or potential" volume of dumped goods. Since this phrase is not found in subsection 42(3), the Tribunal concluded in that case that it can only consider actual volume of imports[11], although it is not limited to using the same import data as used by the Deputy Minister as long as it coincides with a period that either is the same as or falls within the Deputy Minister's period of investigation[12]. Again, these differences support the Tribunal's interpretation that subsections 35(1) and 41(1) on the one hand, and subsection 42(3) on the other, are different.

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7. *Ibid*. at 21, 33 and 38.
8. December 31, 1994, *Canada Gazette* Part I, Extract, at 4845.
9. *Ibid*. at 4903.
10. *Ibid.*
11. *Supra* note 3, at 13.
12. *Ibid.*

Another reason why the motion ought not to be allowed relates to the Deputy Minister's authority with respect to his final determination of dumping under subsection 41(1) which provides that he may terminate an investigation for a given country in case of negligible volume of dumped imports. Should the Tribunal allow the motion, a Tribunal's order immediately terminating its inquiry with respect to Spain and New Zealand would deprive the Deputy-Minister of his authority to make such determination based on actual or potential volume of dumped imports, whichever data he feels should be used. This, in the Tribunal's view, is something that neither the Government, by implementing Canada's international obligations, nor Parliament, by enacting the modifications to SIMA, could have wanted without specifying it clearly.

The Tribunal is cognizant of the Tribunal's statements made in *Stainless Steel Round Bar* referred to by counsel for Francosteel and Sollac and it notes that, in *Stainless Steel Round Bar*, such statements were made while it was addressing the specific issue of which time period it had to consider when determining whether the volume of dumped goods from a country is negligible[13]. The comments in *Stainless Steel Round Bar* were made at the end of the Tribunal's inquiry, with the Tribunal having the benefit of complete data. Obviously, all that the Tribunal meant to say is that it could "terminate" its injury inquiry with respect to a "negligible" country only after having heard all the evidence and arguments. This, in the Tribunal's view, is in keeping with the Tribunal's decision in this motion that it can only determine the issue of negligibility at the conclusion of the injury stage of its proceedings.

For all these reasons, the motion is denied.

Patricia M. Close
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Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

13. *Ibid*. at 11.