CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, June 12, 2000

Request for Interim Review No.: RD-99-002

IN THE MATTER OF a request for an interim review of the finding made by the Canadian International Trade Tribunal on March 21, 1997, in Inquiry No. NQ-96-002 concerning:

FRESH GARLIC ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

ORDER

On February 15, 2000, the Canadian International Trade Tribunal received a request for an interim review from the Garlic Growers' Association of Ontario. The Tribunal has decided, pursuant to subsections 76.01(3) and (4) of the *Special Import Measures Act*, that an interim review is not warranted.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

Reasons to follow.

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, June 27, 2000

Interim Review No.: RD-99-002

IN THE MATTER OF a request for an interim review of the finding made by the Canadian International Trade Tribunal on March 21, 1997, in Inquiry No. NQ-96-002 concerning:

FRESH GARLIC ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

STATEMENT OF REASONS

BACKGROUND

On March 21, 1997, the Canadian International Trade Tribunal (the Tribunal) issued its finding in Inquiry No. NQ-96-002 concerning fresh garlic originating in or exported from the People's Republic of China (China). The finding stated, in part:

> Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of fresh garlic originating in or exported from the People's Republic of China has caused material injury to the domestic industry. The finding is only to apply to fresh garlic imported into Canada from the People's Republic of China from July 1 to December 31, inclusive, of each calendar year.

On February 15, 2000, the Tribunal received a request for an interim review of the finding from the Garlic Growers Association of Ontario (GGAO). The GGAO requested that the Tribunal review the finding and issue an order amending the finding to impose anti-dumping duties during the entire year. The request was supplemented by further documentation on February 22 and March 6, 2000.

The request for an interim review was made under subsection 76(2) of the "old" *Special Import Measures Act*[1]. On April 15, 2000, amendments to SIMA came into force.[2] In accordance with the transition provisions contained in the amendments, as the determination as to whether to initiate an interim review is made after April 15, 2000, the provisions of SIMA, as amended, are to be applied to the Tribunal's determination.

On April 11, 2000, the Tribunal asked the GGAO to respond to the following question:

> Does the Tribunal have the jurisdiction to make the order requested by the GGAO to amend the Finding so that it applies to fresh garlic imported into Canada from the [People's] Republic of China throughout the year? In particular, does the Tribunal have the authority to expand the seasonal scope of the Finding in a review order?

1. R.S.C. 1985, c. S-15 [hereinafter SIMA], as it read on April 14, 2000.
2. S.C. 1999, c. 12. Unless otherwise indicated, all references in these reasons to SIMA are references to the "new" SIMA, as amended.

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On April 17, 2000, the GGAO provided the Tribunal with a response to this question. On April 20, 2000, the Tribunal provided the China Chamber of Commerce of Importers & Exporters of Foodstuffs, Native Produce and Animal By-Products (the China Chamber of Commerce) with a copy of the public version of the request for an interim review, as supplemented, the Tribunal's letter of April 11, 2000, and the GGAO's response to that letter. Protected exhibits were made available only to independent counsel who had filed a declaration and undertaking with the Tribunal in respect of the use, disclosure, reproduction, protection and storage of confidential information on the record of the proceedings, as well as the disposal of such confidential information at the end of the proceedings or in the event of a change of counsel. On May 18, 2000, the China Chamber of Commerce made a submission on the Tribunal's jurisdiction to expand the seasonal scope of the finding. On June 1, 2000, the GGAO replied to that submission.

PRELIMINARY ISSUE

Subsection 76.01(3) of SIMA provides that the Tribunal shall not conduct an interim review at the request of any person unless that person satisfies the Tribunal that the review is warranted. In the Tribunal's view, a review is not warranted where it is not within the Tribunal's jurisdiction to make the order sought in the request for an interim review. Therefore, the first issue which the Tribunal has to address is whether it has the jurisdiction to make the order requested by the GGAO to amend the finding so that it applies to fresh garlic imported into Canada from China throughout the year.

POSITION OF PARTIES

GGAO

The GGAO submitted that the Tribunal has the jurisdiction to review "any matter" that was before the Tribunal in its original inquiry and, therefore, can review the seasonal scope of the finding. The GGAO submitted that the Tribunal did not make findings in respect of two classes of goods, the first being fresh garlic imported from China from January 1 to June 30, inclusive, of a calendar year, and the second being fresh garlic imported from China from July 1 to December 31, inclusive, of a calendar year. Rather, the GGAO submitted, the Tribunal made one finding of material injury, against fresh garlic imported from China, and then indicated that the finding is to only apply during a portion of the year. In the GGAO's view, this distinguishes the present case from *Carbon Steel Plate*[3] and *Bicycles*,[4] wherein the Tribunal expressly excluded certain goods from its material injury findings. The GGAO submitted that the finding is clear and unambiguous and that, therefore, there is no need to refer to the Tribunal's statement of reasons to interpret the finding.[5]

The GGAO submitted that the Tribunal's decision in *Carbon Steel Plate* can be further distinguished from the present case, in that *Carbon Steel Plate* dealt with the exclusion of particular goods, and the present case deals with the seasonal application of a finding.[6]

3. Motion (12 December 1997), RR-97-006 (CITT).
4. Motion (3 July 1997), RR-97-003 (CITT).
5. Reliance was placed on *J.V. Marketing* v. *Canada*, [1994] F.C.J. No. 1786, F.C.A., online: QL (FCJ).
6. Reliance was placed on Member Gracey's additional comments in *Carbon Steel Plate* for this distinction. *Supra* note 3 at 10.

The GGAO also relied on the Tribunal's decision in *Whole Potatoes*[7] for the proposition that the Tribunal has the jurisdiction to change the time period in which anti-dumping duties are applied. In that case, the Tribunal modified its finding on review by substituting a seasonal imposition of anti-dumping duties for the imposition of duties throughout the year. The GGAO submitted that the Tribunal, therefore, has the jurisdiction to do the reverse.

The GGAO further submitted that the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*[8] supports the proposition that, in a review, the imposition of duties may need to be varied in order to offset dumping.

Finally, the GGAO submitted that it is not appropriate for the GGAO to file a new dumping complaint in respect of fresh garlic imported from China from January 1 to June 30, inclusive, of each calendar year.

China Chamber of Commerce

The China Chamber of Commerce submitted that the Tribunal made findings in respect of two classes of fresh garlic imported from China. The China Chamber of Commerce also submitted that the Tribunal's exclusion of fresh garlic imported from China from January 1 to June 30, inclusive, of each calendar year was essentially a finding that those imports of garlic were not causing injury to the domestic industry; this is supported by the Tribunal's statement of reasons. In the China Chamber of Commerce's view, the Tribunal only has the authority to review findings in respect of goods that, it has found, have caused or are threatening to cause injury. It was submitted that there is no logical distinction between an exclusion based on product specification or price (which, it was submitted, cannot be reviewed) and one based on the period of time during which the goods are imported.

The China Chamber of Commerce submitted that the Tribunal's authority to review a finding should be interpreted in light of Canada's obligations under the ADA. It was submitted that, consistent with these obligations, the review process exists for the purpose of determining whether the continued imposition of anti-dumping duties is warranted and not as a means of imposing duties on goods not previously subject to such duties.

Finally, the China Chamber of Commerce submitted that the GGAO's appropriate course of action is to file a new dumping complaint. It was submitted that an attempt to expand the scope of the finding through the review process is an attempt to circumvent the complaint process and to appeal the finding.

REASONS FOR DECISION ON PRELIMINARY ISSUE

Subsection 76.01(1) of SIMA provides:

> At any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Minister of Finance, the Deputy Minister or any other person or of any government, conduct an interim review of
>
> (*a*) the order or finding; or
>
> (*b*) any aspect of the order or finding.

7. *Order* and *Statement of Reasons* (14 September 1995), RR-94-007.
8. Annex 1A to the *Agreement Establishing the World Trade Organization*, April 15, 1994 (entered into force 1 January 1995) in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat, 1994) 168 [hereinafter ADA].

It is clear that the Tribunal's authority to conduct an interim review is limited to the review of an order or finding described in sections 3 to 6 of SIMA.

Subsection 3(1) of SIMA reads, in part:

> Subject to section 7.1, there shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or subsidizing of goods of the same description has caused injury or retardation, is threatening to cause injury or would have caused injury or retardation except for the fact that provisional duty was applied in respect of the goods, a duty as follows.[9]

Subsection 3(1) refers specifically to an order or finding of injury, retardation or threat of injury. Duties are imposed pursuant to subsection 3(1) only on those goods in respect of which the Tribunal has made an order or finding of injury, retardation or threat of injury. The subsection does not refer to any other type of order or finding. Therefore, if the Tribunal has not made a finding of injury, retardation or threat of injury with respect to the goods for which an interim review is sought, there is no "order or finding described in" section 3 for the Tribunal to review pursuant to subsection 76.01(1). As such, the Tribunal would lack the jurisdiction to initiate such a review.

This interpretation is consistent with section 47 of SIMA. Subsection 47(1) reads:

> An order or finding made by the Tribunal with respect to any dumped or subsidized goods, other than an order or finding described in any of sections 3 to 6, terminates all proceedings under this Act respecting the dumping or subsidizing of the goods, other than proceedings under Part I.1 [dispute settlement respecting goods of a NAFTA country] or II [dispute settlement respecting goods of the United States] or subsection 76.02(1) or (3) [reviews after a matter is referred back].

Subsection 47(1) refers to all orders or findings other than an order or finding described in sections 3 to 6. It follows from the wording of subsection 47(1) that, if the Tribunal has not made an order or finding of injury, retardation or threat of injury with respect to certain goods (i.e. an order or finding described in section 3), all proceedings under SIMA are terminated with respect to those goods. Therefore, an interim review could not be initiated with respect to those goods.

The Tribunal is of the view that subsection 76.01(1) of SIMA, when read in the context of sections 3 and 47, confers on the Tribunal the jurisdiction to conduct an interim review only in respect of an order or finding dealing with dumped goods which the Tribunal has found have caused injury or retardation or threatened to cause injury.[10] Therefore, the key question that must be asked in this case is whether the Tribunal found that fresh garlic imported into Canada from China between January 1 and June 30, inclusive, caused injury or retardation or threatened to cause injury.

The GGAO has suggested that the Tribunal found that fresh garlic originating in or exported from China throughout the year had caused injury and that the Tribunal then determined that the finding was only to apply to a portion of the year. The China Chamber of Commerce has suggested that there was no finding of injury against fresh garlic originating in or exported from China between January 1 and June 30, inclusive.

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9. Only section 3 is mentioned because the finding is one described in that section. It is the Tribunal's view that its reasons are equally applicable to the interim review of orders or findings described in sections 4 to 6.
10. The Tribunal is of the view that the language in SIMA is not ambiguous and that, therefore, reference to international agreements, such as the ADA, as an interpretative aid is not necessary. However, the Tribunal agrees with the statements made in *Carbon Steel Plate* to the effect that the ADA supports the view that goods for which there is no injury finding are not subject to subsequent review. *Supra* note 3 at 9.

After considering these two interpretations of the finding, the Tribunal finds that the terms of the finding are not clear. This is particularly the case given the different language used in the finding as opposed to other findings where the Tribunal has granted exclusions based either on seasonality, product description, country of origin or price.[11] Therefore, the Tribunal finds that it is appropriate for the Tribunal to refer to the statement of reasons in order to interpret the finding.[12]

The Tribunal first notes that the statement of reasons deals with a single class of subject goods: fresh garlic originating in or exported from China. The issue as to the period during which the finding was to apply was dealt with in the following manner by the Tribunal:

> In light of the foregoing, the Tribunal cannot find that dumped imports of fresh garlic from China have caused material injury to the domestic industry during a period of the year when domestic growers cannot supply the market. Accordingly, the Tribunal finds that it is appropriate in this inquiry to make a finding that applies only to imports of fresh garlic from China from July 1 to December 31, inclusive, . . . in each calendar year.[13]

In the Tribunal's view, this statement makes it clear that the statement in the finding that "[t]he finding is only to apply to fresh garlic imported into Canada from the People's Republic of China from July 1 to December 31, inclusive, of each calendar year" was a finding that fresh garlic imported from China during the remaining portion of the year had not caused material injury to the domestic industry. The statement of reasons goes on to state that, since there is a domestic industry in Canada which produces like goods to the subject goods, "in the Tribunal's opinion, there can be no 'material retardation of the establishment of a domestic industry'".[14] The statement of reasons contains no finding of threat of injury in respect of fresh garlic imported from China during any portion of the year, particularly, between January 1 and June 30, inclusive.

As the statement of reasons reveals that there was no finding of injury or retardation with respect to fresh garlic imported into Canada from China between January 1 and June 30, inclusive, and that there was no finding of threat of injury in respect of fresh garlic imported from China at any time of the year, the Tribunal is of the view that the finding should be interpreted to mean that there was no finding of injury, retardation or threat of injury caused by fresh garlic imported into Canada from China between January 1 and June 30, inclusive. Therefore, there is no order or finding described in section 3 of SIMA with respect to fresh garlic imported into Canada from China between January 1 and June 30, inclusive. In light of this, the Tribunal is of the view that it does not have the jurisdiction to conduct an interim review in respect of those goods.[15]

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11. For example, see *Iceberg Lettuce*, *Finding* (30 November 1992), *Statement of Reasons* (15 December 1992), NQ-92-001; *Stainless Steel Round Bar*, *Finding* (4 September 1998), *Statement of Reasons* (21 September 1998), NQ-98-001; *Cold-rolled Steel Sheet*, *Findings* (27 August 1999), *Statement of Reasons* (13 September 1999), NQ-99-001; and *Bicycles*, *supra* note 4.
12. *J.V. Marketing*, *supra* note 5.
13. NQ-96-002, *Statement of Reasons* (7 April 1997) at 18.
14. *Ibid.*
15. This case is distinguished from *Whole Potatoes*, *supra* note 7, in that, in that case, there was a finding of material injury caused by imports during the entire year in the original inquiry. A more narrow, seasonal order was made on review.

Accordingly, as the Tribunal does not have the jurisdiction to expand the scope of the finding to impose anti-dumping duties during the entire year, it is the Tribunal's view that an interim review is not warranted.

Pierre Gosselin
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Presiding Member

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