CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 21, 1990

Review No.: RR-90-001

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding of material injury of the Canadian Import Tribunal dated June 11, 1985, in Inquiry No. CIT-2-85, as amended on July 23, 1987, in Review No. R-9-86, concerning:

CERTAIN NICKEL AND NICKEL ALLOY SEAMLESS TUBING IMPORTED FROM JAPAN OR OTHERWISE INTRODUCED INTO THE COMMERCE OF CANADA BY A MANUFACTURER, PRODUCER, VENDOR OR EXPORTER IN JAPAN

O R D E R

The Canadian International Trade Tribunal, under the provisions of section 76 of the *Special Import Measures Act*, has conducted a review of the finding of material injury made by the Canadian Import Tribunal on June 11, 1985, in Inquiry No. CIT-2-85, as amended in Review No. R-9-86 on July 23, 1987.

Under subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the above-mentioned finding.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member

Robert J. Martin
Robert J. Martin
Secretary

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Special Import Measures Act - Whether to rescind or continue, with or without amendment, the finding of the Canadian Import Tribunal dated June 11, 1985, in Inquiry No. CIT-2-85, as amended on July 23, 1987, in Review No. R-9-86, relating to the above-mentioned goods.

DECISION: The Canadian International Trade Tribunal rescinds the above-mentioned finding because it appears that, in the foreseeable future, there will be no demand for the subject goods in the Canadian market, and, therefore, there is no imminent threat of materially injurious dumping from Japan. In coming to its decision, the Tribunal recognized the unique vulnerability of the sole Canadian producer of the subject goods to dumping from any source in the sporadic market for large nuclear contracts. If unanticipated orders materialize, and if the industry believes that it is competing with a dumped tender, it could have recourse to the initiation of anti-dumping proceedings under the *Special Import Measures Act.*

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	October 22-25, 1990
Date of Order and Reasons:	December 21, 1990
Tribunal Members:	Arthur B. Trudeau, Presiding Member W. Roy Hines, Member Charles A. Gracey, Member
Director of Research:	Peter Welsh
Research Officer:	John O'Neill
Statistical Officer:	Sonia McEachern
Registration and Distribution Clerk:	Pierrette Hébert

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Participants:

	G.P. MacPherson and Suzette Cousineau		Guy J. Pratte and Stéphane Bertrand
for	Sandvik Tube Inc.	for	Babcock & Wilcox Canada
	(Manufacturer)		**(Fabricator)**
	Donald J.M. Brown, Q.C.		Robin McDonald
for	Mitsui & Co. (Canada) Ltd.	for	Foster Wheeler Limited
	(Importer)		**(Fabricator)**
	Richard S. Gottlieb and Peter E. Kirby		
for	Sumitomo Metal Industries, Ltd.		
	(Exporter)		

Witnesses:

Thomas M. Moylan President Sandvik Tube Inc.	Robert N. McNair Cost Accounting Supervisor Sandvik Tube Inc.
W.E. (Bill) Boyd General Manager Steel Division Sandvik Canada Inc.	Victor R. Hodowanski, P.Eng. Contract Engineer Structural Fabrications and Heat Transfer Mechanical & Structural Products Ontario Hydro
John A. Potts Director International Operations Foster Wheeler Limited	Masahiro Yamamoto Manager of Marketing and Sales Sumitomo Metal America Inc.

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TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
W. ROY HINES, Member
CHARLES A. GRACEY, Member

STATEMENT OF REASONS

SUMMARY

The Canadian International Trade Tribunal (the Tribunal) has reviewed the finding of material injury to the domestic production of nickel and nickel alloy seamless tubing caused by dumped imports from Japan. The finding was issued by the Canadian Import Tribunal (the CIT) on June 11, 1985, and amended on July 23, 1987.

Sandvik Tube Inc. (Sandvik), of Arnprior, Ontario, is the sole Canadian producer of subject goods. Sandvik argued that the finding should be continued to protect it from material injury caused by dumped prices.

Mitsui & Co. (Canada) Ltd. (Mitsui), Sumitomo Metal Industries, Ltd. (Sumitomo) and Babcock & Wilcox Canada (Babcock & Wilcox), respectively the importer, exporter and a Canadian fabricator using subject goods, argued that the finding should be rescinded.

The Canadian market for subject goods consists of two distinct segments: nuclear-grade tubing for large nuclear projects and commercial tubing for other industrial uses. The demand in the market for nuclear-grade nickel and nickel alloy seamless tubing has been very sporadic, with only 10 contracts during the last 10 years and only 3 since the finding was issued in June 1985. The last of these contracts was recently awarded to a French tubing producer. Sandvik does not fully service the commercial segment of the market. Since 1987, Sandvik has concentrated on producing other product lines, notably stainless steel tubing.

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The Tribunal rescinds the finding because it appears that, in the foreseeable future, there will be no demand for the subject goods in the Canadian market, and, therefore, there is no imminent threat of materially injurious dumping from Japan. While it is apparent that future demand in Canada is inevitable, it is not likely to occur in the foreseeable future.

In coming to its decision, the Tribunal recognized the vulnerability of the Canadian industry to material injury from dumped products. It was left unconvinced that dumping of Japanese products would not resume if large orders for subject goods occurred in the near future. Further, the Tribunal noted that, if, in the future, the domestic producer believes it is competing with a dumped bid, the provisions of the *Special Import Measures Act* (SIMA) allow the initiation of anti-dumping proceedings on the basis of an irrevocable tender, thus providing a deterrent to injurious dumping in the Canadian market.

BACKGROUND

This is a review under section 76 of SIMA of the finding of material injury made by the Canadian Import Tribunal in Inquiry No. CIT-2-85 on June 11, 1985, as amended on July 23, 1987, in Review No. R-9-86, concerning certain nickel and nickel alloy seamless tubing imported from Japan or otherwise introduced into the commerce of Canada by a manufacturer, producer, vendor or exporter in Japan.

Since the finding was issued in 1985, there have been several requests for review. They were opposed by Sandvik, the sole Canadian manufacturer of the subject goods. Under section 76 of SIMA, the Tribunal initiated a review of the finding on June 5, 1990. A notice of review was forwarded to all known interested parties and was published in Part I of the June 16, 1990, edition of the Canada Gazette.

The Tribunal sent questionnaires to known manufacturers and importers of the subject goods. From the replies to these questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports. Tribunal members visited Sandvik's manufacturing facilities in Arnprior, Ontario, on September 21, 1990, to view the production process.

The record of this review consists of all relevant documents, including the original finding, the 1987 review finding, the notice of review, replies to the questionnaires, the staff reports, the staff reports of the original inquiry, the staff reports of Review No. RR-90-002, concerning certain stainless steel pipe, as well as evidence and testimony given during public and *in camera* sessions held in Ottawa, Ontario, from October 22 to 25, 1990. All public exhibits were made available to interested parties, while protected exhibits were provided to independent counsel who had provided undertakings respecting the non-disclosure of confidential information.

Sandvik was represented by counsel at the hearing, submitted evidence and made argument in support of continuing the finding.

Mitsui, Sumitomo and Babcock & Wilcox, respectively the importer, the exporter and a Canadian fabricator, were represented by counsel at the hearing. They submitted evidence and made argument in support of rescinding the finding.

Foster Wheeler Limited (Foster Wheeler), another fabricator, was represented by its corporate counsel. It submitted evidence and argument concerning its contention that straight nickel alloy tubing and U-bent nickel alloy tubing are not like goods and that, therefore, U-bent tubes should be excluded from the finding, if continued.

PRELIMINARY SUBMISSIONS

Mitsui

Counsel for Mitsui made two preliminary submissions. The first was that continuation of this review is not within the jurisdiction of the Tribunal since, by virtue of subsection 76(5) of SIMA, it was not completed within five years of the date of the finding in Inquiry No. CIT-2-85. Second, it would be discriminatory, and contrary to section 15 of the *Canadian Charter of Rights and Freedoms* (the Charter), for the Tribunal to continue its finding of material injury in respect of tubing originating in or exported from Japan, as section 15 prohibits discrimination, *inter alia*, on the basis of "national or ethnic origin." In support of the latter argument, counsel stated that in Review No. R-16B-85, the CIT amended the finding in Inquiry No. ADT-1-84 so as to rescind an order against imports of identical nickel and nickel alloy tubing originating in or exported from the United States, the Federal Republic of Germany and the Republic of Korea. The amendment, argued counsel, was based on the domestic industry's inability to supply the product. Thus, it is submitted that it would be inequitable and unfair to continue to effectively deny access to the Canadian market to individuals and corporations importing products from Japan, when those importing identical products from other nations are not similarly restricted.

The Tribunal recently expressed its view on the first submission in the Carbon Steel Plates case (Review No. RR-89-006, at pages 4 and 5 of the Statement of Reasons, dated May 1, 1990) and in the Induction Motors case (Review No. RR-89-013, at pages 6 and 7 of the Statement of Reasons, dated October 10, 1990). The Tribunal found that the proper interpretation of subsection 76(5) of SIMA is that a review has only to be initiated within five years of the making of the finding or order and that this interpretation is consistent with the meaning and intent of SIMA as a whole. This same view is adopted by the Tribunal in the present review.

In regard to the second submission, the Tribunal is of the view that section 15 of the Charter has no application in the present context. The courts have determined, on numerous occasions, that the Charter applies only to individuals present in Canada, and not to legal persons such as corporations. Findings of the Tribunal are made against certain products originating in or exported from certain countries, and not against corporations or individuals of a particular ethnic or national origin. Under SIMA, only imported products found to have been dumped and materially injurious are subject to the imposition of anti-dumping duties.

The finding against goods from other countries to which counsel refers was made in respect of a separate inquiry that involved a much broader class of goods and several countries. The subsequent review, in 1986, which resulted in the order excluding certain goods, was based on evidence before the CIT at that time. In the present case, section 15 of the Charter presents no bar to the jurisdiction of the Tribunal to make a finding under section 76 of SIMA on the basis of evidence now before it.

SUMMARY OF THE INQUIRY AND REVIEW

Inquiry No. CIT-2-85

On June 11, 1985, in Inquiry No. CIT-2-85, the CIT found that the dumping of certain nickel and nickel alloy seamless pipe and tubing from Japan was materially injurious to the production in Canada of like goods.

In concluding that Nor-Sand Metals Inc. (Nor-Sand)[1] had been materially injured by the dumping of Japanese nickel and nickel alloy seamless pipe and tubing, the CIT noted that the business lost to the Japanese product was a significant portion of that awarded in Canada in 1984. This loss impacted directly on Nor-Sand's sales, profitability and employment for 1984 and thereafter. It also forced Nor-Sand to advance production of other orders planned for production in 1985 so that it could maintain plant loading during 1984, thereby producing goods for inventory, contrary to past practice.

The CIT was also satisfied that the dumping of seamless pipe and tubing from Japan, if allowed to continue, was likely to cause injury to the domestic industry. The CIT pointed to the anticipated tender call in mid-1985 for tubing for four more moderator heat-exchanger units at Ontario Hydro's Pickering nuclear power generating station. Sales risked being lost to dumped imports from Japan in the absence of an injury finding.

The CIT also considered the argument that, although the contracts lost during the inquiry period were for nuclear-grade tubing, the domestic industry was also concerned about the dumping of commercial-grade tubing. Nuclear and non-nuclear tubing are physically indistinguishable. They are manufactured on the same equipment. However, nuclear-grade tubing requires more testing and is subject to more stringent tolerance specifications.

Review No. R-9-86

In this review, conducted during 1987, the CIT reviewed two findings. The first, Inquiry No. ADT-1-84, concerned certain stainless steel, nickel and nickel alloy pipe and tubing, welded and seamless, originating in or exported from the United States, the Federal Republic of Germany and the Republic of Korea. The second, Inquiry No. CIT-2-85, concerning certain nickel and nickel alloy seamless pipe and tubing imported from Japan, was reviewed for the specific purpose of determining whether nickel and nickel alloy seamless pipe should be excluded from the finding.

The CIT found that nickel and nickel alloy pipe comes in such a wide range of sizes, alloys and specifications that no one company could meet this diverse demand. It noted that, despite anti-dumping protection in the nickel and nickel alloy pipe industry, Nor-Sand had remained a negligible player in the market, and it surmised that Nor-Sand's difficulties must be related to factors other than dumping from the subject countries. The CIT therefore amended the 1985 finding to exclude nickel and nickel alloy seamless pipe.

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1. Nor-Sand is the predecessor of Sandvik Tube Inc.

THE PRODUCT

The goods under review are nickel and nickel alloy seamless tubing, in size ranges from _ in. (3.175 mm) to 2½ in. (63.5 mm) outside diameter and with a wall thickness from 0.006 in. (0.152 mm) to 0.154 in. (3.912 mm), excluding the following products that were not produced domestically:

1. nickel and nickel alloy tubing, in the wall thicknesses and diameters specified that meet aircraft specifications and are certified for aircraft production, when imported for use exclusively in the manufacture or repair of aircraft or aircraft parts;

2. seamless, bent, shot-peened nickel and nickel alloy tubing for use in Canadian production for pressurized water reactor systems; and

3. seamless I-600 and I-690 thermally treated nickel and nickel alloy tubing (i.e., heat-treated for more than one hour at temperatures exceeding 500°C) for use in Canadian production for pressurized water reactor systems.

Tubing is generally specified in two dimensions, such as outside diameter and wall thickness or inside diameter and wall thickness. The manufacturing of seamless tubing starts with a raw material known as an extruded hollow, which is a round bar or billet of nickel or nickel alloy that has been cored, then drawn out using a hot extrusion process. The hollow is processed into tubing by either cold drawing or cold rolling (pilgering).

Nickel and nickel alloy tubing may be constructed from a wide variety of nickel alloy grades. Nickel tubing contains 99.5 percent nickel and, under the "Unified Numbering System" (UNS) for nickel products, is designated as "Nickel 200." Nickel alloy tubing is generally defined as an alloy that contains over 30 percent nickel and not less than 12 percent chromium by weight.

The chemical composition of the tubing is identified by its American Iron and Steel Institute (AISI) grade or its UNS grade. Some proprietary grades of nickel alloy have been developed and are identified by their trade names. Technical testing standards for these goods are usually determined with reference to two similar standards, the American Society for Testing and Material (ASTM) standard or the American Society of Mechanical Engineers (ASME) standard. In addition, end users, such as Ontario Hydro, may develop their own specifications, which may be more stringent than either the ASTM or ASME standards.

There are two distinct markets for the subject goods, "nuclear" and "commercial." In the nuclear market, the producer sells high-quality nickel alloy tubing for use in components, such as heat exchangers for nuclear power generating stations. This market is characterized by large and infrequent contracts. The commercial application market for the subject goods typically involves much smaller orders of nickel or nickel alloy tubing, of various size and alloy specifications, for use in the petrochemical and pulp and paper industries. These goods are used in applications where maximum corrosion resistance is required.

THE INDUSTRY

Sandvik, of Arnprior, Ontario, constitutes the domestic industry for the purpose of this review. It is a division of Sandvik Canada Inc., which is a wholly owned subsidiary of Sandvik AB of Sweden. Sandvik AB is a large multinational producer and distributor of steel and other metal products. It is well established in the North American market with tubular product mills in the United States and Canada and worldwide distribution networks.

The Arnprior facility was started by Noranda Inc. (Noranda) in 1976. The plant was primarily set up to supply nickel and nickel alloy tubing to the nuclear power industry in Canada and abroad, at a time when the outlook for nuclear power was very promising. It operated as the Special Metals Division of Noranda Metal Industries Ltd. until 1980. In 1981, Noranda and Sandvik Canada Inc. formed Nor-Sand, a joint venture with each party owning 50 percent. During 1987, Sandvik Canada Inc. purchased Noranda's shares of Nor-Sand and changed the company's name to Sandvik Tube Inc. In March 1990, Sandvik Tube Inc. was amalgamated with Sandvik Canada Inc., becoming its Sandvik Tube Division.

Sandvik produces a wide range of pipe and tubing, in a broad spectrum of metallurgical compositions of stainless steel, nickel and nickel alloy for both the domestic and export markets. Most nickel alloy tubing is made from approximately six alloys that contain varying percentages of nickel. Sandvik uses both the cold-drawing and pilgering processes to manufacture seamless tubing.

Sandvik does not participate fully in all facets of the commercial market. The variety of alloys required, the number of different sizes and the typically small orders make it uneconomical for Sandvik to fully service that market. However, Sandvik does produce some commercial-grade products and markets them through six distributors in Canada, including Sandvik Steel Canada Inc.

Sandvik's main activity concerning the subject goods is the manufacture of nuclear-grade tubing for use in components of CANDU nuclear power generating stations. The company has also developed, and produces for export, a number of highly specialized nickel and nickel alloy products for commercial and nuclear applications.

The company has the equipment and trained personnel to manufacture and perform all of the required testing for nuclear-grade tubing. There are only four other mills in the world with such capabilities, and these are located in Sweden, Germany, France and Japan.

Fabricators, such as Babcock & Wilcox or Foster Wheeler, are the major direct customers for nuclear applications of nickel and nickel alloy seamless tubing. These fabricators build components, such as heat exchangers, for nuclear power generating stations for supply to utilities, such as Ontario Hydro, or to Atomic Energy Canada Ltd.

Alternatively, a utility may purchase the nickel alloy tubing and directly "free-issue"[2] it to the fabricator chosen to build the component.

POSITION OF PARTIES

The Industry

Sandvik submitted that the finding should be continued. The finding has enabled it to obtain two of the three major contracts awarded for nuclear-grade nickel alloy tubing since 1985. Sandvik claims that it is now in approximately the same position as in 1985. Orders for nuclear tubing have been few, but several large orders are anticipated in the near future. The company feels that it risks losing these contracts if it has to compete with dumped prices.

The company presented evidence indicating that there will be a buoyant market for the subject goods in nuclear applications over the next five years. Counsel argued that, even if the orders did not occur in the immediate future, the finite life of the existing nickel alloy tubing installed in nuclear power plants means that it will have to be replaced at some future date. Timing is questionable, but the replacement of these tubes is, nevertheless, imminent.

Sandvik submitted that Sumitomo, the Japanese exporter, is very interested in this Canadian market for nickel alloy tubing because of the relatively high margins these products earn. Counsel for Sandvik further submitted that these high margins invite dumping, in that a producer can sell at less than fully accounted cost and still make a significant contribution to overhead expenses. Counsel invited the Tribunal to examine Sumitomo's bid to Foster Wheeler for the recent Ontario Hydro Bruce "A" generating station tubing contract as evidence of the Japanese producer's interest in the Canadian market.

While the finding has effectively eliminated Sumitomo from the Canadian market for the subject goods since 1985, counsel pointed to the bids submitted by Sumitomo for several contracts in 1984 and 1985 as evidence of that company's propensity to dump. As well, counsel stated that the current recession and worldwide excess capacity in tubular product mills will contribute to the desire of the exporter to obtain business, even at dumped prices.

Sandvik submitted that it would be materially injured by the dumping of these products. Sales of nickel and nickel alloy seamless tubing earn a higher, per unit contribution margin and are essential to the company's overall, long term profitability. The rescission of the finding would have an adverse effect on current expansion plans for Sandvik's Arnprior plant. Further, without the opportunity to obtain the future nickel alloy tubing contracts for Ontario Hydro at fair prices, Sandvik risks losing its capability to produce tubing to nuclear specifications. Sandvik's position was that it could compete with fair competition, but could not compete against dumped prices.

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2. Under certain circumstances, such as tight time schedules, Ontario Hydro purchases nickel alloy tubing directly from the tubing producers, then "free issues" the tubing to whichever fabricator is eventually chosen to build the necessary component.

Importers/Exporters

Sumitomo, a Japanese producer of nickel and nickel alloy seamless tubing, submitted that it did not have a propensity to dump these, or any other, goods in Canada. The subject goods were a small portion of its total production, and its plant was running at near capacity producing other products such as stainless steel seamless tubing. Further, Japan was not experiencing a recession, and Sumitomo's markets were strong.

Sumitomo pointed to the fact that it had not been accused of dumping any products in any market over the last five years. Also, it had been exporting stainless steel tubing to Canada in direct competition with Sandvik's stainless steel products, and Sandvik had been doing very well in the market for those products.

Counsel stated that Sumitomo's bid price for the recent Bruce "A" nickel alloy tubing contract was not a dumped price. Furthermore, as the definition of a sale under SIMA includes an irrevocable tender, counsel argued that Sumitomo would not have submitted a dumped price because, even if the finding were rescinded, such goods, upon entry into Canada, if found to be dumped, would be subject to anti-dumping duties. Counsel also argued that, if the finding were rescinded and, in the future, Sandvik believed Sumitomo had submitted a bid at dumped prices, SIMA would allow Sandvik to request that an investigation be initiated based on evidence of an irrevocable tender.

Rescinding the finding would not preclude Sandvik from winning future nickel alloy tubing contracts. Sandvik is an able competitor as evidenced by its success in the stainless steel tubing markets both in Canada and the United States. Conversely, continuing the finding will not ensure that Sandvik wins any future contracts, as evidenced by the recent award, by Foster Wheeler, of the Bruce "A" tubing contract to a French tubing producer. Sumitomo also contended that Sandvik's proposed expansion plan did not rely on nuclear products and would not be materially affected by the continuation or rescission of this finding.

Counsel argued that Sandvik's forecast of the future market demand had been refuted by testimony and that, in the near future, there would be little or no demand in the Canadian market for nuclear-grade nickel alloy tubing.

Mitsui, an importer of Sumitomo products, submitted that the bid for the Bruce "A" contract was made at a fair price and, through evidence gathered during cross-examination of the Sandvik witnesses, argued that Sandvik could have bid at that price level or lower, especially taking into account the preferential purchasing practices of Ontario Hydro. Further, counsel submitted that events preceding the original finding are irrelevant in the context of this review.

Counsel for Mitsui also argued that the finding against imports from Japan had not offered any protection to the Canadian industry because evidence showed that major orders have been placed with producers from other countries, not Sandvik. Further, it is not the role or responsibility of the Tribunal to protect Canadian industry and give it a base so that it can operate on a worldwide basis. Its role is restricted to ensuring that the Canadian industry does not suffer material injury caused by dumping.

Fabricators

Counsel for Babcock, one of the largest Canadian users of nickel alloy tubing, submitted that evidence and testimony indicate that there are presently no projects planned or pending for nuclear-grade nickel alloy tubing. Therefore, there will be no imminent demand for the subject goods in nuclear applications.

Counsel also argued that Sandvik is in a much healthier financial position in 1990 than it was when the finding was issued in 1985. Sandvik's reliance on sales of nickel alloy tubing had diminished since the finding. Its recent profits rely much more on sales of other goods, notably stainless steel tubing. In addition, counsel for Babcock adopted the arguments submitted by counsel for Sumitomo and Mitsui.

Counsel for Foster Wheeler, also a large Canadian user of the subject goods, submitted that the nickel alloy seamless U-bent tubing produced by Sumitomo are not like goods to the nickel alloy seamless tubing in straight lengths produced by Sandvik. Counsel stated that, from Foster Wheeler's perspective, the U-bent and straight tubes have different physical characteristics, have a different end-use market and are not substitutable. Consequently, as nickel alloy seamless U-bent tubing is not available from the Canadian producer, it should be excluded from the finding.

ECONOMIC INDICATORS

The Tribunal examined several economic indicators respecting the demand and supply of nickel and nickel alloy seamless tubing from 1986 through the first half of 1990. These indicators included production levels, shipments, imports, exports, investment, production capacity, employment, market share and profitability of the Canadian producer. The Tribunal also heard evidence regarding prospects for future sales of nuclear-grade nickel and nickel alloy tubing.

There are two distinct markets for nickel and nickel alloy tubing. The commercial market is, for the most part, supplied by imports from the United States and, to a lesser degree, from France. Sandvik testified that demand for small quantities of different alloy types makes it impractical for it to produce the variety of tubing sizes and specifications necessary to fully serve this market. Sandvik's sales in this market have declined steadily since 1986.

The nuclear market has been characterized by sporadic demand for large volume orders of tubing. Since the finding was issued in June 1985, there have been only three orders for nuclear-grade nickel alloy seamless tubing: one in 1986, one in late 1989 and the most recent in 1990. Sandvik was awarded the contract for the first order by Babcock & Wilcox, for moderator heat exchangers for Ontario Hydro's Pickering nuclear power generating station. The second order was awarded to Sandvik by Ontario Hydro, which "free issued" the tubing to Babcock & Wilcox for use in replacement moderator heat exchangers in the Darlington nuclear power generating station. Foster Wheeler, which is fabricating replacement moderator heat exchangers for Ontario Hydro's Bruce "A" nuclear power generating station, recently awarded the third order to a French tubing producer. Sandvik's domestic sales of the subject goods in both market segments, while important in 1986 and 1990, were negligible during 1987, 1988 and 1989.

The Arnprior plant was built to produce nuclear-grade nickel alloy tubing for the domestic nuclear industry. Since 1986, Sandvik has quite successfully shifted its dependence from sales of this product line. In the absence of demand for nuclear tubing, it developed other products, such as stainless steel seamless tubing, for which there is a more constant, reliable market demand, while reducing its sales of other unprofitable lines, such as stainless steel pipe. Sandvik also developed niche markets in Europe and the United States for highly specialized nickel alloy tubing for commercial and nuclear use.

Large contracts for nickel alloy seamless tubing, completed by Sandvik during 1986 and 1990, have made significant contributions to the overall profit position of the company in those years. Such contracts are important on their own and enhance the company's longer term prospects as a producer of these specialized products.

The financial performance of the company, while poor during 1987, has improved significantly since Sandvik AB acquired full ownership of the facility. Under new management, the company has solidified its position in the market for other products. Profits from both domestic and export sales increased during 1988, 1989 and the first six months of 1990. Export sales of both nickel alloy and stainless steel tubular products increased substantially during the period until the first six months of 1990, when these sales declined. Export sales of stainless steel tubing to the United States increased during the period. However, Sandvik's access to this market, and its ability to compete with US producers of stainless steel tubing, is hampered by a rules of origin problem that does not allow Sandvik access to tariff reductions under the Canada - United States Free Trade Agreement (FTA). This situation is also making it more difficult for Sandvik to compete in Canada with US producers that are able to benefit from tariff reductions under the FTA.

During the latter half of 1989, due to orders for stainless steel products, Sandvik's plant was running at full capacity. Bolstered by the order for nickel alloy tubing for Ontario Hydro, the plant also operated at full capacity during the first six months of 1990.

In August 1990, Sandvik submitted an investment proposal to its parent company in Sweden that would significantly increase its capacity. At the time of the hearing, it was waiting for approval to proceed with this plan.

REASONS FOR DECISION

In considering whether to continue or rescind a material injury finding pursuant to a review under section 76 of SIMA, normally there are two questions that the Tribunal addresses. First, if the finding is rescinded, is dumping likely to resume in the foreseeable future? Second, if the dumping resumes, is it likely to cause material injury to the production in Canada of like goods?

In this case, there are two segments of the market for the subject goods.

Regarding the commercial market, the Tribunal heard evidence that this segment is served primarily by imports. The Canadian producer's interest in this market is basically limited to large orders, rather than the more typical day-to-day supply business.

The producer did not provide any evidence or argument supporting the continuation of the finding in relation to this market segment.

The Tribunal heard testimony that raised questions about the future of the nuclear contract market. A key question facing the Tribunal was the prospect for future sales of nuclear-grade nickel alloy tubing in Canada.

Demand for nuclear-grade tubing has been sporadic. Since 1985, only three contracts have been awarded. Sandvik was awarded the contracts for the first two most recent orders, but not the third one. The witness for Sandvik presented evidence that re-tubing contracts for nickel alloy tubing would be awarded in the future, even imminently, which he explained to mean over the next five years.

The Tribunal heard testimony regarding Ontario Hydro's past requirements for, and the projected life of, nuclear-grade nickel alloy tubing. The utility experienced problems with a certain alloy type when used with Lake Ontario water. This problem did not arise at the Bruce nuclear power generating station, which uses Lake Huron water. Testimony indicated that the problem tubes at the two Lake Ontario nuclear generating stations, Pickering and Darlington, have been, or are currently being, replaced. The anticipated life of these tubes is approximately 15 years. The witness for Ontario Hydro was called primarily to testify regarding the recent tenders it awarded. The witness stated that he may not be fully aware of all aspects of the demand for nickel alloy tubing. Consequently, the Tribunal, at the request of counsel for Sandvik, requested that the witness obtain the best possible information regarding the Ontario Hydro's future demand for the subject goods. Written confirmation of the witness' testimony was subsequently received by the Tribunal and distributed to independent counsel for comments.

The Tribunal questioned witnesses about other potential the nuclear contracts. In Canada, the only other potential new nuclear power generating station is Point Lepreau II in New Brunswick. Potential offshore projects include Wolsong II in Korea and additional CANDU units in Romania. No evidence of any concrete plans for these projects was presented. Because of the lead times for such projects, the demand for subject nickel alloy tubing for these projects, if they went ahead, would not occur in the foreseeable future.

Evidence and testimony suggest that Ontario Hydro has now installed or replaced all the nickel alloy tubing required to keep its nuclear power generating stations operating. While the replacement of this tubing is inevitable, barring any factors unknown at this time, there do not appear to be prospects for sales in the imminent future. Moreover, no proposals for new nuclear projects in Canada have reached a decision phase. Even if decisions were made soon, the ensuing demand for tubing would, because of long lead times, not likely materialize in the near future. In a recent decision on stainless steel bars, the Tribunal stated that it typically focuses on circumstances in the next year or two and places considerably less weight on the possibility of dumping sometime later in the five-year period during which a finding might be continued. It is impossible for the Tribunal and suppliers to anticipate, with any degree of certainty, what is likely to occur in the market for tubing in the medium or long term. Market and technological conditions could change, leading to major increases or sharp declines in potential demand.

In the absence of any firm indication of imminent and foreseeable domestic orders for the subject goods, the Tribunal has no basis upon which to continue the finding. The Tribunal feels compelled, however, to address the testimony, evidence and argument that it heard on the likelihood of a resumption of dumping and on whether a resumption of dumping would cause material injury to the domestic production of like goods.

The Tribunal is of the opinion that dumping could resume if unanticipated domestic orders for nuclear-grade tubing materialized. Sumitomo has dumped in the past and, based on evidence and testimony received during the review, the Tribunal is not convinced that it would refrain from dumping in the future. The bid recently made by Sumitomo on the Bruce "A" re-tubing project, had it been accepted, would have been subject to significant anti-dumping duties on the basis of the Ministerial specification made in 1985. Given the sporadic nature of this market, where there are large and infrequent orders, the Tribunal observes that Sumitomo could have eliminated any risk of a bid being considered dumped by providing information to Revenue Canada for the establishment of normal values.

Sandvik competes in the large contract, more sporadic, nuclear project nickel alloy tubing market, rather than the lower volume commercial market that demands a large variety of alloy type and size specifications for much smaller orders. The sporadic nature of the nuclear market is clearly demonstrated by the fact that there have only been three orders for these goods since 1985. The evidence provided during this review indicates the importance to Sandvik of the two contracts that it obtained for these goods during that time.

The Sandvik plant in Arnprior was built to produce nuclear-grade nickel and nickel alloy seamless tubing. The expenses associated with maintaining this capability are significant. Much of the employee expertise in production and testing is not necessary for the production of seamless stainless steel tubing, on which Sandvik has concentrated since the market for nuclear quality tubing diminished in the mid-1980s. Even though Sandvik is in a stronger financial position in 1990 than it was in 1985, the Tribunal is of the view that, should orders for nuclear-grade nickel alloy tubing occur in the near future, the loss of one such order could be materially injurious to Sandvik's production of like goods.

CONCLUSION

The Tribunal did not receive any persuasive evidence that large domestic orders for nuclear-grade nickel alloy tubing are imminent. Although orders are inevitable, evidence adduced during the review indicates that these are not likely to occur in the foreseeable future. Therefore, there is no imminent threat of materially injurious dumping from Japan. Consequently, the Tribunal rescinds the finding.

The Tribunal recognizes the vulnerability of the domestic producer to material injury from dumped products in this sporadic market for very large and important nuclear contracts. The Tribunal notes that it was left unconvinced by the evidence and arguments put forward by parties seeking to have the finding rescinded on the basis that dumping of the subject goods from Japan was not likely to resume, or not likely to cause material injury to the Canadian industry.

Those in the industry are aware that, in the event of an upcoming project, if the domestic producer believes that it is competing with a dumped tender, the provisions of SIMA would allow the initiation of anti-dumping proceedings on the basis of evidence of dumping in an irrevocable tender, thus providing a deterrent to dumping in the Canadian market.

REQUEST FOR AN EXCLUSION

Foster Wheeler argued that the U-bent nickel alloy seamless tubing available from suppliers, such as Valinox in France and Sumitomo in Japan, are not like goods to the straight nickel alloy seamless tubing produced by Sandvik and, thus, should be excluded from the finding. As the finding is rescinded, the Tribunal does not find it necessary to address this request for an exclusion.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Charles A. Gracey
Charles A. Gracey
Member