CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 12, 1997

Review No.: RR-97-006

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on May 6, 1993, in Inquiry No. NQ-92-007, concerning certain carbon steel plate and allow steel plate originating in or exported from Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom and the former Yugoslav Republic of Macedonia;

AND IN THE MATTER OF a motion dated November 25, 1997, brought by Stelco Inc. requesting an order that, in the review of its finding in Inquiry No. NQ-92-007, the Canadian International Trade Tribunal will examine: (a) structural plate, as defined by the Deputy Minister of National Revenue, up to and including 4 inches in thickness; and (b) PVQ plate, as defined by the Deputy Minister of National Revenue, including PVQ plate made to ASTM specifications A515 and A516, grade 70, up to and including 3.125 inches in thickness, and, if circumstances warrant, continue its original finding, as amended, to include such plate.

ORDER

The Canadian International Trade Tribunal hereby denies the motion.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Anita Szlazak
Anita Szlazak
Member

Michel P. Granger
Michel P. Granger
Secretary

The Statement of Reasons will be issued at a later date.

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

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, December 29, 1997

Review No.: RR-97-006

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on May 6, 1993, in Inquiry No. NQ-92-007, concerning certain carbon steel plate and alloy steel plate originating in or exported from Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom and the former Yugoslav Republic of Macedonia;

AND IN THE MATTER OF a motion dated November 25, 1997, brought by Stelco Inc. requesting an order that, in the review of its finding in Inquiry No. NQ-92-007, the Canadian International Trade Tribunal examine: (a) structural plate, as defined by the Deputy Minister of National Revenue, up to and including 4 inches in thickness; and (b) PVQ plate, as defined by the Deputy Minister of National Revenue, including PVQ plate made to ASTM specifications A515 and A516, grade 70, up to and including 3.125 inches in thickness, and, if circumstances warrant, that it continue its finding, as amended, to include such plate.

REASONS FOR DECISION

BACKGROUND

On November 20, 1997, the Canadian International Trade Tribunal (the Tribunal) issued a notice of review[1] of its finding made on May 6, 1993, in Inquiry No. NQ-92-007, concerning certain hot-rolled carbon steel plate and high-strength low-alloy plate not further manufactured than hot-rolled, heat-treated or not, originating in or exported from Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom and the former Yugoslav Republic of Macedonia.[2] The finding in Inquiry No. NQ-92-007 excluded, in part, the following goods:

(i) subject plate exceeding 3.125 in. (79.375 mm) in thickness;
(ii) subject plate made to ASTM specifications A515 and A516M/A516, grade 70, of any thickness (PVQ plate).

On November 25, 1997, counsel for Stelco Inc. (Stelco) filed a notice of motion with the Tribunal requesting that it issue the following order:

> That in the Review of its finding in NQ-92-007, the Tribunal will examine: (a) structural plate as defined by the Deputy Minister up to and including 4 inches in thickness; and (b) PVQ plate as defined by the Deputy Minister, including PVQ plate made to ASTM specifications A-515 and A-516 Grade 70, up to and including 3.125 inches in thickness and, if circumstances warrant, will continue its original finding, as amended, to include such plate.

The Tribunal received submissions in support of the motion from Stelco, Algoma Steel Inc. (Algoma) and IPSCO Inc. (IPSCO). The Tribunal received submissions in opposition to the motion from the following: A.G. der Dillinger Hüttenwerke; Aciers Francosteel Canada Inc.; Alberta Pressure Vessel

1. *Canada Gazette* Part I, Vol. 131, No. 48 at 3546.
2. *Statement of Reasons*, May 21, 1993.

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

Manufacturers Association; British Steel Canada Inc. (BSC); USIMINAS S.A.; Preussag Stahl AG; Olbert Metal Sales; a group of US steel mills comprised of U.S. Steel Group (a unit of USX Corporation), Bethlehem Steel Corporation, LTV Steel Company Inc., National Steel Corporation and Inland Steel Company; Nippon Steel Corporation (Nippon); and a group of Canadian auto parts stampers and suppliers comprised of Maksteel Canada, Titan Tool & Die Limited, Woodstock Stamping Inc., Karmax Division, Magna International and Fabricated Steel Products Inc.

In his reply submissions, counsel for Stelco submitted that the submissions on behalf of USIMINAS S.A., BSC, the US steel mills and the Canadian auto parts stampers and suppliers were filed and served late and, therefore, should be rejected by the Tribunal. The Tribunal notes that these submissions were filed with the Tribunal on December 3, 1997, the filing date established by the Tribunal.

In addition, counsel for Stelco submitted that the submissions on behalf of Nippon, the US steel mills and the Canadian auto parts stampers and suppliers should be rejected on the basis that those companies are not parties in this review. It is not clear to the Tribunal, based on the submissions before it, that Nippon and the auto parts stampers and suppliers are interested parties for purposes of this review. Therefore, the Tribunal did not consider their submissions. However, the US steel mills, which were parties to the inquiry, may be considered interested parties for purposes of this review.

POSITION OF PARTIES

Counsel for Stelco submitted that, under subsection 76(2) of the *Special Import Measures Act*[3] (SIMA), the Tribunal has the discretion to review any order or finding and, in such a review, to re-hear "any matter" that was before it in its inquiry under section 42. In counsel's view, the words "any matter" confer a wide review jurisdiction on the Tribunal. He submitted that the Tribunal's decision in Review No. RR-94-003[4] confirms that any issue that was before the Tribunal in an inquiry can be re-heard in a review under subsection 76(2). In counsel's view, the only limitation on the Tribunal in a review under section 76 is that such a review must be in respect of the same goods as those considered in the inquiry under section 42, namely, "any goods to which the preliminary determination applies," and the review must deal with the order or finding made under section 43. On this basis, counsel submitted that the issue of imports of subject plate exceeding 3.125 inches in thickness and PVQ plate and their exclusion from the finding was a matter heard by the Tribunal in Inquiry No. NQ-92-007 and that, under subsection 76(2), the Tribunal may re-hear "any matter" relating to these exclusions, including the justification for their continuation or removal.

In the view of counsel for Stelco, the phrase "At any time after the making of an order or finding described in any of sections 3 to 6," in subsection 76(2) of SIMA, does not reduce or confine the broad jurisdiction under subsection 76(2), but is simply a reference back to the order or finding made under section 43 and to the time when the Tribunal's review jurisdiction commences. Counsel for Stelco and counsel for Algoma and IPSCO submitted that exclusions form a part of, and depend for their validity on, an injury finding made by the Tribunal and that, without such a finding, exclusions cannot have an independent

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

4. *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and [the former] Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan*, *Order*, May 2, 1995, *Statement of Reasons*, May 16, 1995.

existence. To read subsection 76(2) to mean that the Tribunal cannot review exclusions from an injury finding reflects a wrongful fettering of the Tribunal's discretion.[5]

Counsel for Stelco prefaced his submissions about the Tribunal's decision on a preliminary matter in Review No. RR-97-003[6] (*Bicycles*) by stating that there is no rule of *stare decisis* applicable to Tribunal findings and that a subsequent panel is free to disagree with the decision or reasoning of a previous one. Counsel went on to distinguish the decision in *Bicycles*, insofar as it dealt with a request to expand the class of goods as defined by the Deputy Minister of National Revenue (the Deputy Minister), and to disagree with both the majority and the dissenting views of the Tribunal concerning the issue of its jurisdiction in a review to remove or alter an exclusion made in a finding.

Counsel for Stelco pointed out that the majority in *Bicycles* concluded that, because the Tribunal had excluded higher-priced bicycles from the finding and because anti-dumping duties, therefore, were not collected on these goods, the finding was not one described in section 3 of SIMA. Counsel submitted that this interpretation is wrong. First, counsel submitted that subsection 76(2) does not say that the Tribunal's review jurisdiction is confined only to goods to which anti-dumping duties apply. Second, any restriction on jurisdiction in the face of clear empowering language in the legislation must be found in equally clear language and, in counsel's view, the reference to sections 3 to 6 in subsection 76(2) is not a restriction of jurisdiction.

Counsel for Stelco also disputed the Tribunal's interpretation of section 47 of SIMA in *Bicycles*. He submitted that the objective of section 47 is to end proceedings where the Tribunal makes a no injury finding. In his view, exclusions differ from no injury findings in that, in the case of an exclusion, the Tribunal has made an injury finding, but has decided to exclude certain goods from that finding. The exclusion only has force and effect because it is part of that finding. Counsel submitted that an order or finding remains in place, together with the exclusions, and is, therefore, an order or finding "described" in sections 3 to 6.

Finally, counsel for Stelco submitted that applying the rationale in *Bicycles* would be illogical. By way of illustration, he referred to the example of a review of a finding concerning an agricultural product with a seasonal exclusion.[7] Counsel submitted that the logic in *Bicycles* would mean that the Tribunal could

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5. *Maple Lodge Farms Limited* v. *Government of Canada*, [1982] 2 S.C.R. 2.

6. *IN THE MATTER OF requests to expand the coverage of the finding of the Canadian International Trade Tribunal made on December 11, 1992, in Inquiry No. NQ-92-002, concerning bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater, and frames thereof, originating in or exported from Taiwan and the People's Republic of China, Reasons for Decision*, July 3, 1997.

7. *Fresh Iceberg (Head) Lettuce Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-92-001, *Finding*, November 30, 1992, *Statement of Reasons*, December 15, 1992; *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-94-001, *Finding*, February 9, 1995, *Statement of Reasons*, February 24, 1995; and *Whole Potatoes with Netted or Russeted Skin, Excluding Seed Potatoes, in Non-Size A, Also Commonly Known as Strippers, Originating in or Exported from the State of Washington, United States of America, for Use or Consumption in the Province of British Columbia; and Whole Potatoes, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia, Excluding Seed Potatoes, and Excluding Whole Potatoes with Netted or Russeted Skin in Non-Size A, Originating in or Exported from the State of Washington*, Canadian International Trade Tribunal, Review No. RR-94-007, *Order* and *Statement of Reasons*, September 14, 1995.

not reconsider the scope of the seasonal exclusion, notwithstanding changes in the reality of the production cycle and the marketplace, such as the ability of growers to subsequently be able to supply the relevant products during the excluded period.

Counsel for Algoma and IPSCO referred the Tribunal to its decision in Review No. RR-94-001[8] and submitted that it supports the view that subsection 76(2) of SIMA is a broad, jurisdiction-conferring provision which gives the Tribunal authority to re-hear any matter that was the subject of inquiry in the original hearing. Counsel also submitted that the addition of the words "described in any of sections 3 to 6" to subsection 76(2) was meant to identify the kind of findings susceptible to review and that, had the legislative intent been to circumscribe narrowly the jurisdiction conferred in the transition from section 31 of the *Anti-dumping Act* to subsection 76(2) of SIMA, such a derogation ought, under the ordinary rules of statutory construction, to have been made plain on the face of the statute.

As noted, the Tribunal received a number of submissions from parties opposed to the motion. Many of the arguments made by these parties were similar. The following summarizes the submissions, without attribution to any particular party.

It was submitted that the Tribunal's review jurisdiction is conferred under subsection 76(2) of SIMA and that it is clear from the English and French wordings of that provision that this jurisdiction only relates to an "order or finding described in any of sections 3 to 6." It does not include all orders or findings made in an inquiry under section 42. It is only in that context and in respect of the review of such an order or finding that the Tribunal may "re-hear any matter before deciding it." Thus, subsection 76(2) does not confer the wide review jurisdiction on the Tribunal claimed by counsel opposite.

It was submitted that sections 3 to 6 of SIMA do not, and cannot, apply to goods which have been excluded by the Tribunal and for which no finding of injury or threat of injury has been made by the Tribunal and on which no duties have been levied, collected and paid. Therefore, subject plate exceeding 3.125 inches in thickness and PVQ plate, which were not found to be injurious to the domestic industry and were not the object of an injury finding or threat of injury finding or subject to anti-dumping duties, cannot be reviewed by the Tribunal under subsection 76(2). The proper course of action for the Canadian producers is to initiate a dumping complaint against the excluded goods.

With respect to the issue of what goods should be before the Tribunal in this review, it was argued that the goods to which the finding in Inquiry No. NQ-92-007 applies are no longer congruent to the preliminary or final determination of the Deputy Minister, but rather are the narrower class of goods on which anti-dumping duties have actually been assessed. After a finding is issued, the goods subject to anti-dumping duties are re-investigated by the Deputy Minister, and importations are monitored. No information exists in respect of imports of goods excluded from an injury finding. Accordingly, the Tribunal, in a review, has no means of knowing whether any excluded goods have been dumped, or by what margins, since the Deputy Minister's period of investigation, which in this case was 1992.

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8. *Malt Beverages, Commonly Known as Beer, of an Alcoholic Strength by Volume of not Less Than 1.0 Percent and not More Than 6.0 Percent, Packaged in Bottles or Cans not Exceeding 1,180 mL (40 oz.), Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, Their Successors and Assigns, for Use or Consumption in the Province of British Columbia, Order* and *Statement of Reasons*, December 2, 1994.

It was submitted that the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*[9] (the ADA), of which Canada is a signatory, supports this view. In particular, Article 11 provides that an anti-dumping duty shall be terminated on the date not later than five years from its imposition, unless the authorities determine, in a review, that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The only interpretation of section 76 of SIMA which is consistent with the ADA is one that limits the Tribunal's jurisdiction in a review to those products found to be dumped and injurious to the domestic industry. Furthermore, the requirements of Article 11 have been implemented in section 47, which terminates proceedings in respect of all goods not subject to an injury finding. The Tribunal was referred to certain decisions of its predecessors, including the decision in Review No. R-8-85,[10] in support of this view.

Finally, it was submitted that none of the cases cited by counsel opposite were examples of review proceedings where the Tribunal reconsidered an exclusion granted in an initial inquiry. In the only relevant precedent, *Bicycles*, the Tribunal found that it could not review goods that had not been found to be injurious to the domestic industry.

In reply, counsel for Stelco submitted that the arguments in opposition to the motion ignore the plain meaning of the words in subsection 76(2) of SIMA which allow the Tribunal to "re-hear any matter" and amend an order or finding as the circumstances require. Counsel referred to the Tribunal's decision in Request for Review No. RD-95-001,[11] where the Tribunal accepted that its jurisdiction under section 76 is a broad one and accepted the Supreme Court of Canada's description of such a discretion in a review as being a "plenary independent power.[12]" Counsel submitted that "plenary" means complete or absolute. Moreover, counsel submitted that the arguments are inconsistent with the decisions in Review No. RR-94-007[13] and Review No. R-3-88.[14]

With respect to submissions regarding the lack of data about imports of subject plate exceeding 3.125 inches in thickness and PVQ plate as a consequence of their exclusion from the Tribunal's finding, counsel for Stelco argued that reviews may be held in cases where there are no or only minimal imports of the subject goods in the period prior to the review.[15] Finally, counsel submitted that an order or finding under

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9. Signed at Marrakesh on April 15, 1994.
10. *Citric Acid and Sodium Citrate Produced by or on Behalf of Miles Laboratories, Inc. in the United States of America*, Canadian Import Tribunal, *Review Finding* and *Statement of Reasons*, October 18, 1985.
11. *IN THE MATTER OF a request for review, under subsection 76(2) of the* Special Import Measures Act*, of the findings made by the Canadian International Trade Tribunal on November 6, 1995, in Inquiry No. NQ-95-002; RESPECTING 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 subsidizing of refined sugar originating in or exported from the European Union*, *Order* and *Statement of Reasons*, July 26, 1996.
12. *Ibid.* at 6.
13. *Whole Potatoes*, *supra* note 7.
14. *Certain Stainless Steel Plate Originating in the Republic of South Africa and Japan and Certain Stainless Steel Sheet Originating in the Federal Republic of Germany and Japan; and Certain Stainless Steel Plate Originating in or Exported from Belgium, the Federal Republic of Germany, France, Italy, Sweden and the United Kingdom*, Canadian Import Tribunal, *Review Finding* and *Statement of Reasons*, July 27, 1988.
15. *Certain Carbon Steel Welded Pipe Originating in or Exported from Argentina, India, Romania, Taiwan, Thailand, Venezuela and Brazil*, Canadian International Trade Tribunal, Review No. RR-95-002, *Order* and *Statement of Reasons*, July 25, 1996.

section 43 of SIMA covers all goods listed as excluded in that order or finding and characterized the list of exclusions as an "*ex post facto*" decision of the Tribunal in the exercise of its discretion only when material injury has been found in respect of those goods.[16]

ANALYSIS

The issue before the Tribunal in this motion is whether, in a review, the Tribunal has the power to reconsider an exclusion that it has previously made and, in doing so, decide to extend the scope of a finding to some or all of the goods that are subject to that exclusion. In the Tribunal's view, to answer this question, one must begin with subsection 76(2) of SIMA, the provision in which the Tribunal's power to review an order or finding is set out.

Before turning to analyze the wording of subsection 76(2) of SIMA, the Tribunal wishes to comment on its decision in *Bicycles*. The Tribunal agrees that the nature of the exclusions at issue in this case is different from the nature of the exclusion in *Bicycles*.[17] In *Bicycles*, in deciding that it did not have the jurisdiction to review the exclusion, the Tribunal relied on the express statement in its statement of reasons in Inquiry No. NQ-92-002[18] that "material injury [had] not been suffered[19]" in the segment of the market for the excluded goods. As a result, it was not necessary for the Tribunal to consider whether it had the jurisdiction to review an exclusion in the absence of such an express statement. However, in Inquiry No. NQ-92-007, the Tribunal did not expressly exclude subject plate exceeding 3.125 inches in thickness and PVQ plate on the same basis as in the finding in Inquiry No. NQ-92-002.[20] Therefore, the reasoning in *Bicycles* is not dispositive of the issue in this motion. However, to the extent that *Bicycles* and the issue

16. *Hetex Garn A.G.* v. *Anti-dumping Tribunal*, [1978] 2 F.C. 507; *Aluminum Coil Stock and Steel Head and Bottom Rails, for Use in the Production of Horizontal Venetian Blinds, Originating in or Exported from Sweden*, Canadian International Trade Tribunal, Inquiry No. NQ-91-004, *Finding*, February 7, 1992, *Statement of Reasons*, February 24, 1992, at 12; and *Certain Corrosion-Resistant Steel Sheet Products, Originating in or Exported from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom and the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-93-007, *Finding*, July 29, 1994, *Statement of Reasons*, August 15, 1994, at 39.

17. The motion in *Bicycles* dealt with four requests which, if granted, would have had the effect of expanding the coverage of the finding to include goods not subject to anti-dumping duties. Three of these requests dealt with changing the Deputy Minister's definition of the subject goods. They are not relevant to the matter before the Tribunal in this motion. The fourth request dealt with an exclusion made for bicycles in the high price range of the market. It is this request that is being referred to by the Tribunal.

18. *Bicycles and Frames Originating in or Exported from Taiwan and the People's Republic of China, Finding*, December 11, 1992, *Statement of Reasons*, December 29, 1992.

19. *Ibid.* at 21.

20. In excluding subject plate exceeding 3.125 inches in thickness, the Tribunal stated, in part: "In view of the limited demand for thicker plate, evidence that this plate is not normally sold by domestic producers, and evidence of specific tenders for such plate on which the domestic industry declined to bid, the Tribunal is of the view that plate over 3.125 in. thick is not readily available from domestic production and, therefore, should be excluded from the finding." In excluding PVQ plate, the Tribunal stated, in part: "In other words, the Tribunal is satisfied that much of the subject PVQ plate that is entering Canada satisfies a demand for a higher-value specialty product that the domestic industry does not produce. Further, the Tribunal is of the view that this exclusion will assist domestic fabricators and end users in remaining competitive in the increasingly open market for products such as pressure vessels, without detriment to the domestic industry, as indicated by their agreement to certain specific end-user exclusions to which the Tribunal now turns." *Supra* note 2 at 25.

before the Tribunal in this motion concern the same question, that is, the Tribunal's power to reconsider an exclusion in a review, the reasons in *Bicycles* are helpful to the discussion that follows.

Subsection 76(2) of SIMA states:

> (2) 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 Deputy Minister or any other person or of any government, review the order or finding and, in the making of the review, may re-hear any matter before deciding it.

In support of the argument that the Tribunal has the jurisdiction to reconsider an exclusion in the context of a review, counsel for Stelco and counsel for Algoma and IPSCO rely, to a significant degree, on the words in subsection 76(2) of SIMA which permit the Tribunal to "re-hear any matter" before making its order on review. However, the Tribunal is of the view that, applying the ordinary rules of statutory interpretation,[21] subsection 76(2) cannot be interpreted in isolation from the related provisions of SIMA, in this case, sections 3[22] and 47.

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

> 3. (1) 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 or is threatening to cause injury, a duty as follows.

Section 47 of SIMA reads as follows:

> 47. Subject to Part I.1 or II and subsections 76(2.1) and (2.2), 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.

It is clear, based on the words "order or finding described in any of sections 3 to 6" in the English version of subsection 76(2) of SIMA and the words "*une ordonnance ou des conclusions rendues en vertu des articles 3 à 6*" in the French version of subsection 76(2), that a review is limited to an order or finding described in sections 3 to 6. Therefore, the Tribunal is not directed, under this subsection, to review orders or findings made under other sections of SIMA, including those made under subsection 43(1).

The Tribunal notes that counsel for Stelco interpreted the phrase "order or finding described in any of sections 3 to 6" by reference to the definition of "order or finding" in subsection 2(1) of SIMA and not by reference to the wording of section 3. The Tribunal notes that this definition not only refers to section 43, as noted by counsel for Stelco, but also refers to other sections of SIMA, including sections 3 to 6 and

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21. The interpretation of all statutes is subject to the ordinary rules of statutory interpretation which provide that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament," *Québec (Communauté Urbaine)* v. *Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3 at 17. See also, *Stubart Investments Limited* v. *Her Majesty the Queen*, [1984] 1 S.C.R. 536.

22. Only section 3 is mentioned because the finding that is being reviewed is a finding described in section 3. The Tribunal's reasons are equally applicable to exclusions made in respect of orders or findings described in sections 4 to 6.

section 76. Regardless, the Tribunal is of the view that the issue before it cannot be resolved without consideration of the specific wording of section 3.

Section 3 of SIMA refers to duties being levied, collected and paid on dumped and subsidized goods in respect of which the Tribunal has made an order or finding of injury, retardation or threat of injury. Thus, the wording of section 3 specifically refers to goods in respect of which the Tribunal has made an injury finding and not to all goods subject to the order or finding generally. It is this distinction which lies at the heart of the issue before the Tribunal. With respect to the specific exclusions before the Tribunal in this motion, it cannot be said that the Tribunal has made an injury finding in respect of the goods covered by these exclusions. It follows that these goods are, therefore, not described in section 3 and, thus, they cannot be subject to review under subsection 76(2).

Turning to section 47 of SIMA, this section refers to an order or finding, other than an order or finding described in any of sections 3 to 6. It follows from the wording of section 3 that section 47 applies to dumped and subsidized goods in respect of which the Tribunal has not made an order or finding that the dumping or subsidizing of such goods has caused injury or retardation or threatens to cause injury, i.e. to dumped or subsidized goods on which duties are not levied, collected and paid. As the goods that are the subject of the exclusions at issue are not goods that the Tribunal has found to have caused injury or retardation or to have threatened to cause injury, then, pursuant to section 47, proceedings would have terminated against these goods at the time that the Tribunal made its finding in Inquiry No. NQ-92-007.

Counsel for Stelco submitted that exclusions from injury findings differ from no injury findings because the bases upon which they are made are different. However, in the Tribunal's view, the wording of SIMA does not recognize such a difference when it comes to the enforcement of the Tribunal's order or finding through the application of duties. As noted, the wording of section 3 of SIMA only allows duties to be applied to goods in respect of which the Tribunal has made an order or finding of injury, retardation or threat of injury. The Tribunal's power to review under subsection 76(2) must be understood within the parameters created by section 3.

Furthermore, the Tribunal is of the view that the attempt to distinguish goods subject to an exclusion from goods subject to a no injury finding could lead to results not contemplated by the wording of SIMA. More specifically, if one accepts counsel for Stelco's submissions, then one must accept that any excluded goods are, in effect, suspended between enforcement and termination throughout the life of a finding and any subsequent orders; that they can be reconsidered at any point in the future; and that a decision can be made to extend the scope of the finding to some or all of those excluded goods, as long as the original finding has been continued. In addition, such a result may lead to the type of uncertainty in the marketplace of which the Anti-dumping Tribunal (the ADT) spoke in Review No. ADT-3B-79,[23] an uncertainty that the Tribunal is not persuaded Parliament intended.

As noted, counsel for Stelco referred to the Tribunal's decision in *Whole Potatoes* and the decision of the Canadian Import Tribunal (the CIT) in *Stainless Steel Plate* in support of his position that the Tribunal has the power, in a review under subsection 76(2) of SIMA, to reconsider an exclusion. The Tribunal is of the view that *Whole Potatoes* clearly does not stand for such a proposition. In *Stainless Steel Plate*, it appears

23. *Polypropylene Homopolymer and Copolymer Resins Originating in Belgium, France, the Netherlands, the United Kingdom and the United States of America, Review Finding* and *Statement of Reasons*, November 16, 1983.

that, prior to the CIT's review, the ADT amended certain exclusions that it had made to the original finding to limit their application and, thus, to bring within the coverage of the finding goods that were previously excluded. These amendments were made under section 31 of the *Anti-dumping Act* and not under section 76 of SIMA. This difference is central to distinguishing the review powers of the ADT under the *Anti-dumping Act* and the review powers of the Tribunal under SIMA. A comparison of the wording of section 31 of the *Anti-dumping Act* and that of subsection 76(2) of SIMA reveals that section 31 of the *Anti-dumping Act* is not only different from subsection 76(2) of SIMA but also much broader. In addition, section 31 of the *Anti-dumping Act* did not refer to, nor limit reviews to, sections analogous to sections 3 to 6 of SIMA.

The Tribunal is of the view that the interpretation of its powers set out above is consistent with decisions of the Federal Court of Appeal and binational panels in which the scope, nature and effect of the Tribunal's power to grant exclusions were considered.[24] Moreover, in the Tribunal's view, the language in SIMA is not ambiguous and, therefore, reference to international agreements such as the ADA as an interpretative aid is not necessary.[25] However, in the Tribunal's view, the relevant provisions of the ADA also support the view that the goods excluded from a finding of injury or threat of injury, on which no duties have been imposed, are not subject to subsequent review. In particular, Article 11.2 provides, in part, that the "authorities shall review the need for the continued imposition of the duty."

The Tribunal is of the view that, in a review, it has the power to rescind or continue an order or finding against some or all of the goods subject to the order or finding, but it does not have the power to increase or expand the scope of its review beyond the goods covered by the order or finding being reviewed. With respect to exclusions, this means that, if the Tribunal continues an order or finding, it may leave an exclusion as it is or may exclude additional goods. If domestic producers subsequently become concerned about imports of goods that are subject to an exclusion, they may consider filing a new complaint in respect of such goods with the Department of National Revenue. For the above reasons, the Tribunal concludes that it does not have the power, in this review, to consider including, in any order that it may make continuing the finding in Inquiry No. NQ-92-007, subject plate exceeding 3.125 inches in thickness or PVQ plate, which were excluded from the Tribunal's injury finding.

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24. *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America (Injury)*, Article 1904 Binational Panel, Secretariat File No. CDA-93-1904-09, *Opinion and Panel Decision*, July 13 1994; *Hetex Garn*, *supra* note 16 at 508 (this passage was quoted with approval by the same court in *Sacilor Aciéries* v. *The Anti-dumping Tribunal* (1985), 9 C.E.R. 210 (F.C.A.), Court File No. A-1806-83, June 27, 1985); *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not, Originating in or Exported from the U.S.A.*, Article 1904 Binational Panel, Secretariat File No. CDA-93-1904-06, *Memorandum Opinion and Order*, December 20, 1994, at 30.

25. See *Jolana Schavernoch (née Kostrinsky)* v. *Foreign Claims Commission*, [1982] 1 S.C.R. 1092 at 1098; and *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371.

Accordingly, the motion is dismissed.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Anita Szlazak
Anita Szlazak
Member

ADDITIONAL COMMENTS OF MEMBER GRACEY

I wish to make clear that, in my view, the Tribunal's decision in this matter relates to a finding in respect of particular goods. The issue of whether or not a seasonal finding can be expanded in a review was not before the Tribunal and, thus, in my view, has not been settled by these reasons. As the focus in a seasonal finding is on seasonality and not on particular goods, it may be possible to distinguish between expanding a seasonal finding in relation to goods already defined and expanding a finding in respect of goods that previously had been excluded.

Charles A. Gracey
Charles A. Gracey
Presiding Member

ADDITIONAL COMMENTS OF MEMBER CLOSE

I wish to note that, in my view, the reasons in this case are not inconsistent with my dissent in *Bicycles*. The issue of whether or not an adjustment can be made to an indicator that may cover different goods at different points in time, such as a price point, was not before the Tribunal in this case. I do not consider an adjustment to such an indicator, when used by the Tribunal to delineate excluded goods from goods covered by an order or finding, to necessarily have the effect of expanding the goods covered by a finding. Such an adjustment may in fact serve to reinstate the coverage intended by the original finding.

Patricia M. Close
Patricia M. Close
Member