Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Interim Review No. RD-2017-001

Oil Country Tubular Goods

Order and reasons issued
Wednesday, October 25, 2017

Canada

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IN THE MATTER OF an interim review, pursuant to subsection 76.01(1) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on April 2, 2015, in Inquiry No. NQ-2014-002, concerning:

OIL COUNTRY TUBULAR GOODS ORIGINATING IN OR EXPORTED FROM CHINESE TAIPEI, THE REPUBLIC OF INDIA, THE REPUBLIC OF INDONESIA, THE REPUBLIC OF THE PHILIPPINES, THE REPUBLIC OF KOREA, THE KINGDOM OF THAILAND, THE REPUBLIC OF TURKEY, UKRAINE, AND THE SOCIALIST REPUBLIC OF VIETNAM

ORDER

The Canadian International Trade Tribunal, pursuant to subsection 76.01(3) of the *Special Import Measures Act*, has decided that an interim review of its finding made on April 2, 2015, in Inquiry No. NQ-2014-002, concerning oil country tubular goods originating in or exported from Chinese Taipei, the Republic of India, the Republic of Indonesia, the Republic of the Philippines, the Republic of Korea, the Kingdom of Thailand, the Republic of Turkey, Ukraine and the Socialist Republic of Vietnam, is not warranted.

The request of Borusan Mannesmann Boru for the Canadian International Trade Tribunal to initiate an interim review is therefore, pursuant to subsection 76.01(4) of the *Special Import Measures Act*, denied.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Peter Burn
Peter Burn
Member

Tribunal Panel:	Jean Bédard, Q.C., Presiding Member Serge Fréchette, Member Peter Burn, Member
Support Staff:	Nick Covelli, Lead Counsel Dustin Kenall, Counsel

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STATEMENT OF REASONS

INTRODUCTION

1. Borusan Mannesmann Boru (BMB), a Turkish producer and exporter of steel pipe products including oil country tubular goods (OCTG), requests that the Canadian International Trade Tribunal (the Tribunal) initiate an interim review of its finding in Inquiry No. NQ-2014-002 (the OCTG finding) to exclude BMB's goods from the finding on the basis that the Canada Border Services Agency (CBSA) had, in its related investigation, found BMB to have a margin of dumping of zero.[1]

2. BMB submits that a World Trade Organization (WTO) ruling and decisions of the Tribunal subsequent to the OCTG finding constitute changed circumstances that warrant an interim review.

3. The Tribunal disagrees and therefore has decided that an interim review is not warranted.

PROCEDURAL BACKGROUND

4. On July 28, 2017, the Tribunal received BMB's request for initiation of an interim review pursuant to section 76.01 of the *Special Import Measures Act*.[2]

5. On August 8, 2017, the Tribunal provided the parties to the OCTG finding with a copy of BMB's request, notified them that it had determined that the request was properly documented, and set forth a schedule for submissions on whether the request should be granted.

6. On August 28, 2017, six parties filed written submissions, all but one opposing the request. On September 7, 2017, BMB filed its reply.[3]

LEGAL FRAMEWORK

7. The purpose of an interim review is to determine whether the circumstances require a finding or order to be rescinded, continued with amendment, or continued without amendment.[4]

8. The Tribunal's authority to initiate interim reviews is found in section 76.01 of *SIMA*, which reads as follows:

> **Interim review of orders by Tribunal**
>
> **76.01 (1)** At any time after the making of an order or finding . . . the Tribunal may, on its own initiative or at the request of the Minister of Finance, the President [of the CBSA] or any other person or of any government, conduct an interim review of

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1. It is uncontested that the CBSA has on three separate occasions from December 3, 2014, to December 14, 2015, confirmed that BMB has a zero margin of dumping. See *CBSA, Preliminary Determination – OCTG, Statement of Reasons* (18 December 2014) at para. 138, online at: http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-pd-eng.html; *CBSA, Final Determination – OCTG, Statement of Reasons* (18 March 2015) at para. 159, online at: http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-fd-eng.html; *CBSA, Notice of Conclusion of Reinvestigation* (14 December 2015), online at: http://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/ad1371-1385-1390-1404/ad1371-1385-1390-1404-ri15-nc-eng.html.
2. R.S.C., 1985, c. S-15 [*SIMA*].
3. The request itself and all written submissions contained only public information.
4. Subsection 76.01(5) of *SIMA*.

> **(a)** the order or finding; or
>
> **(b)** any aspect of the order or finding.
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> **Tribunal may re-hear any matter**
>
> **(2)** In conducting an interim review, the Tribunal may re-hear any matter before deciding it.
>
> **Limitation**
>
> **(3)** The Tribunal shall not conduct an interim review at the request of any person or government unless the person or government satisfies the Tribunal that the review is warranted.

9. Rule 72 of the *Canadian International Trade Tribunal Rules*[5] provides guidance in determining whether an interim review is warranted; it reads in relevant part as follows:

> **72** In order to decide whether an interim review under section 76.01 of the *Special Import Measures Act* is warranted, the Tribunal may request the parties to provide information concerning
>
> **(a)** whether changed circumstances or new facts have arisen since the making of the order or finding;
>
> . . .

10. The initiation of an interim review is subject to a high standard, as previously noted by the Tribunal in Request for Interim Review No. RD-2000-001:[6]

> . . . [i]nterim reviews should only be undertaken when there are sufficiently compelling reasons to persuade the Tribunal to do so. New facts or a change of circumstances are not, in and of themselves, enough to warrant an interim review. In the Tribunal's opinion, the information on file in respect of a request must indicate a likelihood that an amendment to the order or finding would occur if an interim review were conducted.

FACTS

11. Despite finding that BMB's exports to Canada had a zero margin of dumping, the CBSA did not terminate its dumping investigation in relation to BMB's goods, and the goods were not excluded from the OCTG finding. Therefore, while imports from BMB may not be subject to anti-dumping duty, BMB remains subject to the CBSA's normal value regime and re-investigations, as well as to any expiry review of the finding that may come about in the future.

12. In late 2016, a WTO panel concluded in *Welded Pipe*[7] that article 5.8 of the *Anti-dumping Agreement* requires WTO members to immediately terminate an investigation where authorities determine that the margin of dumping is *de minimis* and that imports of such goods should not be treated as 'dumped' for the purpose of the analysis and final determinations of injury and causation.[8] Canada did not appeal this decision and took steps to amend *SIMA* to enable the CBSA to terminate future investigations in relation to *de minimis* exporters.

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5. SOR/91-499.
6. *Machine Tufted Carpeting* (21 August 2000), RD-2000-001 (CITT) at p. 3 [*MTC*].
7. *Canada – Anti-dumping Measure on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu* (21 December 2016), WTO Doc. WT/DS482/R, Report of the Panel [*Welded Pipe*].
8. *Welded Pipe* at para. 7.83.

13. Pending the amendments, the Tribunal used its discretionary authority under subsection 43(1) of *SIMA* to exclude the goods of *de minimis* exporters from its finding in *Concrete Reinforcing Bar*[9] (*Rebar*) and *Fabricated Industrial Steel Components*[10] (*FISC*). In both instances the Tribunal cited the WTO panel report as a motive for these exclusions.

POSITIONS OF THE PARTIES

14. BMB takes the position that the WTO ruling and the Tribunal's subsequent treatment of *de minimis* exporters in *Rebar* and *FISC* constitute changed circumstances that warrant an interim review of the OCTG finding in relation to its goods.

15. BMB argues that it is only seeking the same relief that the Tribunal has already granted in *Rebar* and *FISC*, and that an interim review is an appropriate vehicle for such relief given the frequency with which the Tribunal grants exclusions and given the imperative (per article 5.8 of the *Anti-dumping Agreement*) that the rigours of the anti-dumping regime cease "immediately" for zero-margin exporters such as BMB.

16. PT Citra Tubindo Tbk (Citra), an OCTG exporter located in Indonesia, supports BMB's application, relying heavily on the Tribunal's language in *FISC* where it stated that *Welded Pipe* "requires that, once an exporter is found to not have been dumping, that exporter *cannot continue to be subject to the normal value regime and forced to participate in administrative reviews*"[11] [emphasis added]. Citra's submission makes clear that if BMB's request is granted, Citra is also likely to request an exclusion on similar grounds.

17. The opposing parties raise several objections. From a public policy perspective, they raise the spectre that excluding BMB would amount to conferring on it a licence to dump. They also submit that excluding BMB from the finding would open the flood gates to similar requests, including for refunds from the CBSA going back many years.

18. From a legal perspective, they distinguish *FISC* and *Rebar* as involving exclusions granted in the midst of ongoing inquiries, not as part of an interim review of a finding several years old. They argue that the amendments to *SIMA* only give the CBSA—not the Tribunal—the authority to terminate an investigation regarding a single exporter with zero or *de minimis* margins. Further, they submit that the transitional provisions found in section 100 of Bill C-44[12] amending *SIMA*, which are not yet in force but received royal assent on June 22, 2017, explicitly provide that the amendments are not retroactive and are not a valid base for an interim review.

19. In reply, BMB clarifies that it is not seeking to have any retroactive refunds or effect given to the exclusion order. It also notes that the WTO Panel in *Welded Pipe* roundly rejected the argument that exporters with *de minimis* margins should remain subject to anti-dumping investigations for fear of otherwise granting them a licence to dump.

ANALYSIS

20. The grounds for BMB's request are novel. The Tribunal has indicated in the past that changed circumstances that may warrant an interim review "might include changes in the structure of the subject

9. *Concrete Reinforcing Bar* (18 May 2017), NQ-2016-003 (CITT).
10. *Certain Fabricated Industrial Steel Components* (9 June 2017), NQ-2016-004 (CITT).
11. *FISC* at para. 166.
12. Bill C-44, *Budget Implementation Act, 2017* (1st Sess.), No. 1, 42nd Parliament, 2017, c. 20 [*BIA*].

industry, financial circumstances, marketing, or consumption patterns."[13] The classic "changed circumstances" scenario is where domestic production has permanently ceased.[14] There is no precedent for a change in practice and/or a WTO ruling constituting changed circumstances warranting an interim review.

21. Even if, for the sake of argument, a change of practice constitutes changed circumstances, the exclusion of *de minimis* exporters from the *Rebar* and *FISC* findings is not a change in practice. The exclusion of goods from a finding is within the Tribunal's discretionary authority under section 43(1) of *SIMA* to "make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and [to] declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies".[15] As such, whether the Tribunal chooses to exercises its authority to exclude goods in a given case is a matter of case-specific discretion. The Tribunal chose to exercise its discretionary authority in *Rebar* and *FISC*. It chose not to exercise this discretion in *OCTG* (Inquiry No. NQ-2014-002).

22. Although in *Rebar* and *FISC* the Tribunal had the benefit of the WTO panel report in *Welded Pipe* and knowledge of Parliament's intention to consequently amend *SIMA*, those exclusions were by nature *ad hoc*, case-specific measures taken during an inherently transitional period; a unique and temporary set of circumstances were present that did not exist previously and which no longer exist. Now that *SIMA* requires the CBSA to immediately terminate investigations against exporters with zero or *de minimis* margins, the issue will not arise again in an inquiry held by the Tribunal and, consequently, the Tribunal expects such exclusions will not need to be granted again. Two isolated measures do not make a practice, much less "changed circumstances" justifying revision of an existing final injury finding.

23. *Rebar* and *FISC* are also distinguishable from *OCTG* because the Tribunal's decision to exercise its discretionary authority in the former cases were in the context of inquiries that were still open and while the Tribunal was still seized with those matters. There were no pre-existing findings. By contrast, in relation to *OCTG*, BMB is asking the Tribunal to change a final decision. Whether in hindsight the Tribunal should have exercised its discretion differently and excluded BMB's goods from the *OCTG* finding at the time of its final decision in that inquiry is beside the point. It did not and now the case is closed.

24. The principle of finality of the Tribunal's decisions and the importance of this principle as a matter of public policy in the administration of justice are limiting factors that the Tribunal takes into consideration in determining whether an interim review is warranted. While the primary consideration of the Tribunal during an inquiry is to ensure its finding is correct, afterwards the balance shifts, with stability and certainty then taking a more prominent place (hence the heightened standard for initiating an interim review,[16] and the emergence of equitable considerations such as whether new evidence was discoverable earlier).

25. With respect to BMB's position that the WTO *Welded Pipe* ruling constitutes changed circumstances, the Tribunal also observes that there is another recourse mechanism for this purpose.

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13. See, for example, *Women's Leather and Non-Leather Boots and Shoes* (8 March 1994), RD-93-004 (CITT), citing *Grain Corn* (9 April 1990), RD-89-009 (CITT).
14. This was the case in, among others, *Bicycles* (30 September 2013), RD-2013-001 and RD-2013-002 (CITT).
15. *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA); *Sacilor Aciéries v. Anti-dumping Tribunal* (1985) 9 C.E.R. 210 (FCA).
16. See, for example, *Aluminum Extrusions* (12 September 2013), RD-2012-001 (CITT) at para. 18 (holding that the Tribunal must be satisfied that if an interim review were conducted, the order or finding "would likely be amended"); *MTC* at p. 3 ("To initiate interim reviews on a lesser threshold would create an unacceptable level of uncertainty in the duration and durability of a finding or order and would be costly for the parties involved. Proceedings under *SIMA* are often complex and burdensome, and it would not be reasonable to permit the reopening of a case, or part of one, on a lesser standard").

Subsection 76.1(1) of *SIMA* permits the Minister of Finance to implement a WTO ruling by requesting that the CBSA or the Tribunal review existing decisions or findings. It reads as follows:

> **76.1 (1)** Where at *any time* after the issuance, by the Dispute Settlement Body established pursuant to Article 2 of Annex 2 to the WTO Agreement, of a recommendation or ruling, *the Minister of Finance considers* it necessary to do so, *having regard to the recommendation or ruling*, the Minister of Finance may request that
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> > **(a)** the President review *any* decision, determination or re-determination or *any* portion of a decision, determination or re-determination made under this Act; or
> >
> > **(b)** the Tribunal review *any* order or finding described in *any* of sections 3 to 6, or *any* portion of such an order or finding and, in making the review, the Tribunal *may re-hear any matter* before deciding it.
>
> [Emphasis added]

26. There are three notable qualities to this provision. First, it is broadly worded: *any* time, *any* decision, *any* order, *any* matter. Second, it is focussed on the implementation of WTO recommendations and rulings via the "review" of *past* decisions and orders during an anticipated transitional time frame (i.e. before the commencement of an expiry review, at which time the Tribunal and the CBSA can incorporate WTO recommendations and rulings into their determinations themselves). And third, its discretion is conferred on one of the highest-level cabinet ministers in the Government of Canada whose responsibilities include the oversight of Canada's trade remedy laws.

27. The Tribunal does not agree with BMB that section 76.1 of *SIMA* is not a viable avenue of relief on the basis that it should be read narrowly to permit the Minister to only request reviews on an "as applied" basis to the parties and goods at issue in a specific WTO decision. To the contrary, the text and structure indicate that the Minister's discretion is sufficiently wide and remedial to systematically manage the commencement of a review of trade law and policy in light of a WTO recommendation or ruling.

28. The existence of recourse to the Minister of Finance set out in section 76.1 of *SIMA* leads the Tribunal to conclude that the interim review process set out in section 76.01 was not designed or intended to be the vehicle for the Tribunal to review findings further to subsequent WTO recommendations or rulings. This conclusion is reinforced by the transitional provisions in Bill C-44, which received royal assent on June 22, 2017. These transitional provisions state that the amendments to *SIMA* designed to bring *SIMA* into full compliance with the WTO rulings are not sufficient reasons to justify an interim review:

> New Act does not justify review
>
> 100 (4) For the purpose of subsection 76.01(3) of the new Act, the fact that this Act comes into force is not sufficient reason for the Canadian International Trade Tribunal to be satisfied that an interim review of an order or finding is warranted.[17]

29. While the Tribunal must interpret the legislation in a manner that is consistent with Canada's international obligations, this interpretation is subject to the wording of the domestic legislation.[18] The Tribunal cannot ignore section 76.1 of *SIMA* and the intention of Parliament expressed in the provisions of Bill C-44 in the exercise of its judgment in deciding whether an interim review is warranted.

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17. *BIA* at ss. 100(4).
18. *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII) at para. 53; See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324.

CONCLUSION

30. Accordingly, the request of BMB for the Tribunal to initiate an interim review is, pursuant to subsection 76.01(4) of *SIMA*, denied.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Peter Burn
Peter Burn
Member