



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry No. LE-2017-003

Carbon Steel Welded Pipe

*Order and reasons issued
Friday, December 8, 2017*

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IN THE MATTER OF a notice of expiry, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on December 11, 2012, concerning:

**CARBON STEEL WELDED PIPE ORIGINATING IN OR EXPORTED FROM
CHINESE TAIPEI, THE REPUBLIC OF INDIA, THE SULTANATE OF OMAN,
THE REPUBLIC OF KOREA, THAILAND AND THE UNITED ARAB
EMIRATES**

ORDER

On July 29, 2017, the Canadian International Trade Tribunal issued a notice of expiry of finding seeking submissions on whether it should initiate an expiry review of the above-mentioned finding. The Canadian International Trade Tribunal is satisfied that an expiry review is warranted, except for goods exported from the United Arab Emirates by Conares Metal Supply Ltd. Therefore, pursuant to subsection 76.03(5) of the *Special Import Measures Act*, the Canadian International Trade Tribunal has decided not to initiate an expiry review in relation to such exports by Conares Metal Supply Ltd.

Serge Fréchette
Serge Fréchette
Presiding Member

Ann Penner
Ann Penner
Member

Jean Bédard
Jean Bédard
Member

Tribunal Panel: Serge Fréchette, Presiding Member
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STATEMENT OF REASONS

1. On July 29, 2017, the Canadian International Trade Tribunal (the Tribunal) gave notice that its finding made on December 11, 2012, in Inquiry No. NQ-2012-003 concerning carbon steel welded pipe (the subject goods), was scheduled to expire on December 8, 2017, unless an expiry review was initiated by that date.

2. Persons or governments requesting or opposing the initiation of an expiry review were invited to file submissions. In its notice of expiry, the Tribunal requested parties to address all the factors relevant to the issue of whether an expiry review was warranted,¹ including, among other factors, the likelihood of continued or resumed dumping and subsidizing of the subject goods.

3. The Tribunal received submissions requesting the initiation of an expiry review from Nova Tube Inc. / Nova Steel Inc., Atlas Tube Canada ULC, Welded Tube of Canada, and DFI Corporation (collectively, the domestic industry). The United Arab Emirates (the UAE) filed submissions against the initiation of an expiry review of its exports. Conares Metal Supply Ltd. (Conares), a UAE exporter, filed submissions against the initiation of an expiry review of its goods in particular.

LEGAL PRINCIPLES

4. A finding is deemed to have been rescinded at the expiry of the five years following the day on which it was made, unless the Tribunal has initiated an expiry review.² The Tribunal may initiate an expiry review of a finding at the request of any person.³

5. Subsection 76.03(4) of *SIMA* provides that “[t]he Tribunal shall not initiate an expiry review at the request of any person or government unless the person or government satisfies the Tribunal that a review is warranted.” Accordingly, there is an onus on the domestic industry to make a persuasive case, supported by substantive evidence and not mere allegations, to justify the initiation of an expiry review.⁴

1. Pursuant to rule 73.2 of the *Canadian International Trade Tribunal Rules* (SOR/91-499).

2. See subsection 76.03(1) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 [*SIMA*].

3. Paragraph 76.03(3)(b) of *SIMA*.

4. See, for example, *Waterproof Rubber Footwear* (31 January 2007), LE-2006-001 (CITT) at para. 6; *Stainless Steel Round Bar* (18 January 2005), LE-2004-008 (CITT); *Refill Paper* (16 November 1999), LE-99-005 (CITT); *12-Gauge Shotshells* (29 August 2003), LE-2003-002 (CITT); *Leather Footwear* (12 April 2006), LE-2005-005 (CITT); *Wooden Toothpicks* (22 October 1996), LE-96-003 (CITT). The view that an onus exists on the requesting parties to duly substantiate that an expiry review is warranted is consistent with Canada’s obligations under the World Trade Organization (WTO) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)*, which posits the general rule that anti-dumping duties must be terminated not later than five years from the date on which they were imposed. In particular, article 11.3 provides that “. . . any definitive anti-dumping duty *shall be terminated* on a date not later than five years from its imposition . . . unless the authorities determine, in a review initiated before that date . . . upon a duly substantiated request made by or on behalf of the domestic industry . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury” [emphasis added]. The WTO Appellate Body has stated that article 11.3 provides that the continuation of an anti-dumping duty is an *exception* to the otherwise-mandated expiry of the duty after five years. See *United States - Sunset Review of Anti-dumping duties on Corrosion-resistant Carbon Steel Flat Products From Japan* (15 December 2003), WT/DS244/AB/R at para. 104; *United States - Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods From Argentina* (29 November 2004), WT/DS268/AB/R at para. 178.

6. As stated in the notice of expiry of finding, the likelihood of continued or resumed dumping of the goods is one of the factors to be considered by the Tribunal.

ANALYSIS

7. After review of the submissions, the Tribunal is satisfied that—apart from the goods of Conares—an expiry review is warranted.⁵

8. In keeping with its practice and for the sake of judicial economy, the Tribunal will not elaborate on its reasons for finding that an expiry review is warranted. The Tribunal, however, will explain its reasons for deciding that an expiry review is not warranted in relation to Conares given that this decision brings finality to the matter as far as those particular goods are concerned.

9. Conares' exports were not dumped at the time of the final determination made by the Canada Border Services Agency (CBSA). At that time, however, the CBSA was precluded from terminating the dumping investigation in respect of Conares because *SIMA* required it to make dumping determinations on a country-wide basis, and goods from the UAE overall were found to be dumped. In Inquiry No. NQ-2012-003, the Tribunal declined to use its authority to exclude Conares' goods from its finding that the dumping or subsidizing of carbon steel welded pipe was threatening to cause injury for reasons elaborated in its decision. As a result, Conares' goods were potentially subject to anti-dumping duties under the original finding.

10. As further explained in the statement of reasons in Inquiry No. NQ-2012-003R, a proceeding conducted in parallel with this proceeding having regard to the implementation of the recommendations of the WTO Dispute Settlement Body (DSB) in *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu* (DS482), subjecting the goods of an exporter with a zero or *de minimis* margin of dumping to anti-dumping measures constitutes a breach by Canada of its obligations under the WTO *Anti-dumping Agreement*.⁶ Recent amendments were made to *SIMA* in order to enable the CBSA to terminate dumping investigations in respect of exporters with zero or *de minimis* margins of dumping.

11. It is clear from the reasoning adopted by the WTO Panel in the above-mentioned dispute that Conares' exports should not have been subject to the finding in the first place since they were determined not to be dumped.

12. The recent amendments to *SIMA* do not have retroactive effect and, thus, do not provide Conares with relief. In order to get that relief, the domestic industry argued that Conares should petition the Minister of Finance to make a request to the CBSA and/or the Tribunal to review its determination/finding in accordance with section 76.1 of *SIMA*, which provides that such requests implement WTO recommendations and rulings.⁷ Indeed, section 76.1 would seem to be available in these circumstances.⁸

5. For greater clarity, the finding excludes carbon steel welded pipe exported from Chinese Taipei by Chung Hung Steel Corporation and Shin Yang Steel Co. Ltd.

6. *Canada – Anti-Dumping Measures 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.

7. This is the mechanism by which the anti-dumping measures were brought into compliance with the DSB's recommendations and rulings in DS482 in respect of *de minimis* Chinese Taipei exporters.

8. *Oil Country Tubular Goods* (25 October 2017), RD-2017-001 (CITT) at paras. 25-29.

13. Although the Tribunal agrees with the domestic industry that this constitutes for Conares a possible recourse for pursuing its interests, the Tribunal also strongly believes that it is not the only avenue that is available to Conares at this point in time. Indeed, in the context of an expiry proceeding, the Tribunal is required to determine whether its finding should be allowed to expire or whether it *is satisfied* that an expiry review is *warranted*. As pointed out by the domestic industry, while section 76.03 of *SIMA* does not expressly contemplate a partial initiation of an expiry review, the *a contrario* implication of the language used in that provision is that the Tribunal is expressly precluded from initiating a review where one is not warranted. In reaching its decision as to whether or not to initiate the review, the Tribunal must take into account all relevant considerations, including whether or not it is warranted to initiate the review against all subject goods. As such, an expiry review is not necessarily intended to be an all or nothing affair *in all circumstances*. The Tribunal has broad discretionary authority to exclude goods from its findings and orders in extraordinary circumstances.⁹ The Tribunal considers that the specific context of Conares' exclusion request is one of those extraordinary circumstances. It would be entirely improper for the Tribunal to simply ignore those circumstances, particularly if they could result in a scenario in which the exporter was being treated unfairly and/or Canada was at risk of violating its international trade obligations. By interpreting section 76.03 in a manner that is consonant with Canada's international obligations, the Tribunal concludes that Parliament grants it the authority to determine that an expiry review is not warranted in the case of certain goods if at the outset it considers that there are extraordinary circumstances that warrant the exclusion of such goods from a positive injury finding. The Tribunal, thereby, considers that where it has discretionary authority under *SIMA*, it must exercise such authority in a manner that is fair and that is consonant with Canada's international trade obligations.¹⁰

14. The Tribunal has made two decisions following the DSB's recommendations in DS482 where it found it appropriate to exercise its discretion to exclude non-dumping exporters to ensure its findings were fair and in accordance with the WTO case law.¹¹ Put simply, those cases involved extraordinary circumstances and required extraordinary remedies. While there are important distinctions to be made between the facts surrounding the Tribunal's decisions in those two decisions and the present case, they all involve exporters who were directly impacted by the DSB's recommendations in DS482.

15. Likewise, Conares should be excluded from this expiry review given the history and circumstances that led to its inclusion in the Tribunal's finding in the first place. The reasoning employed by the WTO Panel applies to the situation of Conares. The treatment that Conares' exports have received under *SIMA* has been contrary to the *Anti-Dumping Agreement*; they should never have been subject to the finding in the first place because they were neither dumped nor subsidized. As a result, there cannot be a reasonable indication that the expiry of the finding will likely result in the continued or resumed dumping of Conares'

9. *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 (CA); Binational Panel, *Induction Motors Originating In or Exported From the United States of America (Injury)* (11 September 1991), CDA-90-1904-01; Binational Panel, *Certain Cold-Rolled Steel Products Originating or Exported From the United States of America (Injury)* (13 July 1994), CDA-93-1904-09.

10. The Supreme Court of Canada in *R. v. Hape* [2007] 2 SCR 292, 2007 SCC 26 (CanLII) at para. 53, stated that "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result." See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324.

11. *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT) at paras. 191-204; *Fabricated Industrial Steel Components* (9 June 2017), NQ-2016-004 (CITT) at paras. 164-169.

goods given that they were not dumped in the first place. As such, a review is not warranted against those goods.

16. It is very likely that those goods would be excluded from any order of the Tribunal at the conclusion of the expiry review.

17. In any upcoming notice of expiry proceedings, the Tribunal will consider extending this treatment to other exporters who had insignificant margins of dumping (or amounts of subsidy). Those exporters should, as did Conares, bring their situation to the Tribunal's attention in their submission on the initiation of an expiry review. If those exporters do not want to wait for the initiation of an expiry review, they can request a review from the Minister of Finance at an earlier time than that of the notice of expiry.

18. While the Tribunal does not foresee partial expiry reviews in other circumstances (e.g. initiating an expiry review in respect of one country's goods but not another's), the extraordinary circumstances of the present case warrant a departure from the Tribunal's usual approach.

CONCLUSION

19. The Tribunal is satisfied that an expiry review is warranted, except for goods exported from the United Arab Emirates by Conares Metal Supply Ltd. Therefore, pursuant to subsection 76.03(5) of *SIMA*, the Tribunal has decided not to initiate an expiry review in relation to such exports by Conares Metal Supply Ltd.

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