



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Inquiry No. NQ-2019-002

Corrosion-resistant Steel Sheet

*Order and reasons issued
Friday, July 31, 2020*

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IN THE MATTER OF an inquiry, pursuant to section 42 of the *Special Import Measures Act*, concerning the dumping and subsidizing of certain corrosion-resistant flat-rolled steel sheet products of carbon steel sheet originating in or exported from the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam (the subject goods).

ORDER

WHEREAS, in relation to the investigations into the dumping and subsidizing of the subject goods, revisions to the schedule were made by the Canada Border Services Agency (CBSA) on June 18, 2020, in order to alleviate pressures brought on by the COVID-19 pandemic to the interested parties;

AND WHEREAS the revised schedule indicated, among other things, that the CBSA's final determinations or termination of its dumping and subsidizing investigations would be issued on October 16, 2020;

AND WHEREAS the Tribunal suspended the proceedings for the inquiry on June 18, 2020;

AND WHEREAS the Tribunal issued a Revised Notice of Commencement of Inquiry on June 25, 2020, indicating that, as the CBSA's revised schedule impacted the Tribunal's inquiry, the revised procedures and schedule for the remainder of the inquiry would be provided to the parties in due course;

AND WHEREAS the Tribunal issued a further Revised Notice of Commencement of Inquiry on July 13, 2020, regarding the extended inquiry which established the revised procedures and schedule for the remainder of the proceedings;

AND WHEREAS the Tribunal considers it useful to consign in this order the procedural directions and consequent schedule revisions issued previously, and to provide reasons forthwith with respect to the conduct of these proceedings, instead of within the statement of reasons in support of its finding at the conclusion of this inquiry;

The Tribunal hereby issues this order confirming the procedural directions and schedule revisions for the inquiry previously communicated in the manner described above.

Cheryl Beckett

Cheryl Beckett

Presiding Member

Jean Bédard

Jean Bédard

Member

Randolph W. Heggart

Randolph W. Heggart

Member

STATEMENT OF REASONS

SUMMARY

[1] On March 20, 2020, the President of the Canada Border Services Agency (CBSA) issued preliminary determinations of dumping and subsidizing in relation to certain corrosion-resistant flat-rolled steel sheet products of carbon steel sheet originating in or exported from the Republic of Turkey, the United Arab Emirates, and the Socialist Republic of Vietnam (the subject goods).¹

[2] As mandated by the *Special Import Measures Act (SIMA)* in such instances, the Tribunal commenced the present inquiry into whether the dumping or subsidizing of goods had caused injury or threat of injury on the basis of the CBSA's preliminary determinations of dumping and subsidizing. The Tribunal's injury inquiry thus commenced in parallel to the continuation of the CBSA's investigations of dumping and subsidizing.

[3] However, the Tribunal cannot prejudge the outcome of any investigations by the CBSA before they are concluded and it is given notice by the CBSA of a final determination of dumping or subsidizing in respect to any goods. Furthermore, subsection 43(1) of *SIMA* requires that an order or finding be made by the Tribunal with respect to the goods to which a final determination applies.

[4] On June 18, 2020, the President of the CBSA issued a revised schedule for its dumping and subsidizing investigations that are being conducted in parallel to the present injury inquiry.

[5] In the present circumstances, the Tribunal understands that the CBSA extended the schedule for the final phase of its investigations due to difficulties brought on by the COVID-19 pandemic.²

[6] Due to the interplay between the CBSA's work and the Tribunal's inquiry, with the publication of the CBSA's revised schedule, the Tribunal concluded that it would be unable to finish its inquiry in accordance with its initial schedule. As such, the Tribunal decided to issue the procedural directions and revised schedule that are described in the order to which these reasons pertain. The legal basis for doing so is explained below.

[7] The Tribunal is convinced that Parliament never envisaged a situation akin to what the world is now facing by reason of the COVID-19 pandemic when it established the various timelines in *SIMA*. In particular, a situation whereby the CBSA issued a preliminary determination of dumping or subsidizing, thereby triggering the start of the injury inquiry by the Tribunal, but then did not issue a final decision with respect to its investigations on the expiry of its 90-day timeline and, as in this case, prior to the 120-day timeline that the Tribunal had to complete its inquiry and issue its findings.

CONTEXT

[8] A few words to explain the context of the order and why these reasons are warranted.

[9] The Tribunal communicated its procedural directions and revised schedules throughout this inquiry in the typical manner that it normally employs: with letters to the parties; and a revised notice

¹ Exhibit NQ-2019-002-01, Vol. 1 at 1, 2.

² Online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/cor22019/cor22019-ext2-eng.html>.

and schedule on its website.³ Rarely does the Tribunal issue formal orders when issuing such directions or schedule revisions. Typically, as well, the Tribunal will not give reasons for such developments until the conclusion of its injury inquiry, and then, mostly for the sole purpose of recapping otherwise typically uncontroversial decisions of a purely procedural nature.

[10] In this instance, however, the Tribunal's procedural decisions have become controversial. In the circumstances, the Tribunal has decided to consign the subject procedural decisions and schedule revisions to a formal order and to provide the accompanying present reasons because of the subsequent controversy in regard to those matters as raised by various parties in their application to the Federal Court of Appeal in Court File No. A-185-20, which was served on the Tribunal on July 24, 2020.

[11] Fundamentally, the Tribunal wishes to consign in this statement of reasons those that it had intended to give at the conclusion of its inquiry. The present statement of reasons is being issued so as to provide the parties and the Federal Court of Appeal with reasons at this stage because their usefulness appears germane now, rather than later. These reasons will speak for themselves and are offered for the proper administration of justice.

PROCEDURAL BACKGROUND, DIRECTIONS AND SCHEDULE REVISIONS

[12] Pursuant to section 42 of *SIMA*, the Tribunal initiated its inquiry on March 23, 2020, having received a notice of preliminary determinations of dumping and subsidizing on March 20, 2020.

[13] In accordance with subsection 41(1) of *SIMA*, the CBSA's final determinations of dumping and/or subsidizing, or termination of its investigations, were scheduled to be issued on June 18, 2020. In accordance with subsection 43(1), the Tribunal was scheduled to issue its finding on July 17, 2020.

[14] On June 18, 2020, the Tribunal became aware of the CBSA's revised schedule for its dumping and subsidizing investigations. On that date, the CBSA indicated on its website that revisions to the schedule of its investigations were made in order to alleviate pressures brought on by the COVID-19 pandemic to interested parties.⁴ The revised schedule indicated, among other things, that the CBSA's final determinations, or termination, with respect to its dumping and subsidizing investigations would be issued on October 16, 2020.

[15] The Tribunal issued a letter to the parties on June 18, 2020, of its intention to suspend its proceedings in respect of the inquiry following the CBSA's revised schedule.⁵ The Tribunal

³ At the outset of the pandemic, which precluded the possibility of an in-person oral hearing, the Tribunal quickly adapted by setting out procedures for a file hearing, which included written evidence and final submissions from the parties. Applicable procedures were communicated to the parties on May 11 and 21, 2020, and a revised notice of commencement of inquiry was issued on May 25, 2020. Once the Tribunal was able to operationalize a videoconferencing system for the conduct of hearings, it again revised its schedule to accommodate a portion of the hearing, namely, the closing arguments, to be conducted by videoconference. These measures were also communicated to parties by letters on June 3 and 9, 2020. The closing arguments were scheduled to take place by videoconference on June 25, 2020.

⁴ Online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/cor22019/cor22019-ext2-eng.html>. The Tribunal was notified by the CBSA on Friday, June 19, 2020. See Exhibit NQ-2019-002-01B, Vol. 1. The Tribunal also placed print-outs of the CBSA's schedule from its website, as modified on June 18, 2020, on its record for this inquiry for reference. See Exhibit NQ-2019-002-25A, Vol. 1.

⁵ Exhibit NQ-2019-002-25, Vol. 1.

indicated to the parties that remaining deadlines, such as the hearing of closing arguments, would be cancelled and rescheduled in due course.⁶

[16] On June 24, 2020, the Tribunal issued a letter to parties describing its proposed procedures and schedule for the remainder of the inquiry, including, for instance, a timeline for the filing of additional submissions and evidence.⁷ This was important, in particular to ensure that any arguments in relation to “threat of injury” be properly aligned with the forward-looking nature of that analysis and to take into account developments regarding changes in the marketplace, such as those caused by the COVID-19 pandemic, in the intervening approximately three-month period, i.e. the period from the original date of the Tribunal’s injury determination and its new date (30 days following the expected issuance date of the CBSA’s final determinations). The fact that the Tribunal was compelled to extend its inquiry risked affecting the factual foundation for that analysis. Simply put, the Tribunal could not continue on its initial inquiry schedule without having to proceed with a further evidentiary gathering stage.

[17] The Tribunal requested that the parties provide comments in respect of the proposed proceedings by June 30, 2020. AMD, Stelco and the United Steelworkers provided the Tribunal with comments. The parties submitted views on how the Tribunal should sequence the new proposed filings for additional written submissions and evidence to ensure a fair and efficient proceeding.⁸

[18] On June 25, 2020, the Tribunal issued a Revised Notice of Commencement of Inquiry advising that, as the CBSA’s revised schedule impacted the Tribunal’s inquiry, the revised procedures and schedule for the remainder of the inquiry would be provided to the parties in due course.

[19] After considering the parties’ comments on the proposed schedule and procedures described in its letter of June 24, 2020, the Tribunal updated the parties on July 3, 2020, on its proposal for the proceedings. Consistent with the parties’ submissions, the Tribunal proposed that the new evidence could be filed along with the written submissions.⁹ The Tribunal indicated that, to ensure that it was able to maintain its practice of issuing its final injury determination within 30 days of receiving the CBSA’s final determinations, written submissions would be scheduled to be filed before October 16, 2020, which was the new date for the CBSA’s final determinations. Additionally, the Tribunal noted that any revisions of the Investigation Report would directly relate to the CBSA’s final determinations. Finally, the Tribunal offered to hold a case management conference with the parties on July 10, 2020, to discuss the proposed proceedings.¹⁰

[20] Following the case management conference held on July 10, 2020, the Tribunal issued a Revised Notice of Commencement of Inquiry on July 13, 2020, regarding the extended inquiry which established the revised procedures and schedule for the remainder of the proceedings. The hearing of closing arguments by videoconference, which was originally scheduled to take place on June 25, 2020, was rescheduled to October 23, 2020. The Notice also indicated that the Tribunal would issue its finding in this inquiry on November 16, 2020.

⁶ Closing arguments were scheduled to be heard by videoconference on June 25, 2020.

⁷ Exhibit NQ-2019-002-26, Vol. 1.

⁸ Exhibit NQ-2019-002-27, Vol. 1; Exhibit NQ-2019-002-28, Vol 1.

⁹ To the extent that additional evidence was filed by the parties after the issuance of the CBSA’s final determination on October 16, 2020, the Tribunal indicated it would consider extending the length of time given to parties for closing arguments as necessary.

¹⁰ Exhibit NQ-2019-002-29, Vol. 1.

[21] At no time during the events described above did the parties raise any objection to the announced delay in the Tribunal's proceedings. As noted above, the parties' comments on the Tribunal's proposed procedures and schedule for the extended inquiry from the parties mainly addressed details concerning the sequencing of filings for additional written submissions and evidence.

REASONS FOR THE TRIBUNAL'S REVISED SCHEDULE

[22] At the conclusion of an inquiry under section 42 of *SIMA* into whether the dumping or subsidizing of goods has caused injury or retardation or is threatening to cause injury, the Tribunal must make a finding. Subsection 43(1) reads as follows:

43(1) In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall, forthwith after the date of receipt of notice of a final determination of dumping or subsidizing with respect to any of those goods, but, in any event, not later than one hundred and twenty days after the date of receipt of notice of a preliminary determination with respect to the goods, 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 shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.

43 (1) Dans le cas des enquêtes visées à l'article 42, le Tribunal rend, à l'égard de marchandises faisant l'objet d'une décision définitive de dumping ou de subventionnement, les ordonnances ou les conclusions indiquées dans chaque cas en y précisant les marchandises concernées et, le cas échéant, leur fournisseur et leur pays d'exportation. Il rend ces ordonnances ou conclusions dès réception de l'avis de cette décision définitive mais, au plus tard, dans les cent vingt jours suivant la date à laquelle il reçoit l'avis de décision provisoire.

[23] In adopting subsection 43(1) of *SIMA*, which requires the Tribunal to issue its determination forthwith after the date of receipt from the CBSA of notice of a final determination of dumping or subsidizing, but in any event not later than 120 days after the date of receipt of notice of a preliminary determination, it is the Tribunal's view that Parliament did not envision the issuance of the finding in the absence of a final determination of dumping or subsidizing. In this regard, in subsection 41(1), *SIMA* envisions that the CBSA's final determination in respect to any goods for which it has not terminated investigations is issued no later than 90 days from its preliminary determination. Read together and in context, subsections 41(1) and 43(1) of *SIMA* provide the Tribunal up to 30 days after a final determination of dumping or subsidizing under subsection 41(1) to issue its subsection 43(1) finding.

[24] In accordance with the wording of subsection 43(1) of *SIMA*, the Tribunal must make a finding pursuant to that section "with respect to the goods to which the final determination applies" [emphasis added]. This is consistent with the French version of the same provision, which provides that "le Tribunal rend, à l'égard de *marchandises faisant l'objet d'une décision définitive de dumping ou de subventionnement*, les ordonnances ou les conclusions indiquées . . ." [emphasis added].

[25] Furthermore, the same provision requires the Tribunal to declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies. Such findings require an underlying decision of the CBSA, in the form of a final determination pursuant to subsection 41(1) of *SIMA*, that specific goods have been dumped or subsidized. The Tribunal's subsection 43(1) finding is the basis for other *SIMA* provisions, such as certain duty application provisions.

[26] Fundamentally, if the CBSA's investigations do not reveal the existence of dumping or subsidizing, in respect to some or all of the goods, the Tribunal's inquiry into the existence, or not, of injury caused by that dumping or subsidizing loses its *raison d'être*. The Tribunal cannot prejudge the outcome of the CBSA's investigations. The Tribunal must wait until the CBSA delivers any final determination before assessing and finding whether any purported injury is linked to the dumping or subsidizing because, at the end of the CBSA's investigations, none may exist.¹¹

[27] The reference, in subsection 43(1) of *SIMA*, to 120 days from the preliminary determination as the deadline for the Tribunal to make its finding must be understood in its proper context: this requirement cannot be read in isolation without referring to the CBSA's obligation to issue its decision no later than 90 days from its preliminary determination. The obligation placed on the Tribunal in subsection 43(1) of *SIMA*¹² flows from an expectation by Parliament that the Tribunal would have a final determination by the CBSA in its hands before fulfilling those obligations. It would be an absurd interpretive effect to require the Tribunal to issue a finding in the absence of a final decision regarding the dumping or subsidizing from the CBSA.¹³ This would result in the Tribunal's finding being made on speculation and without proper factual basis.¹⁴

[28] Having regard to the foregoing, the Tribunal will issue the finding in this inquiry forthwith following the date of receipt of notice of a final determination of dumping or subsidizing with respect to any of the goods subject to this inquiry. As indicated in its Revised Notice of Initiation of Inquiry issued on July 13, 2020, the finding will therefore be issued on November 16, 2020.

POSTSCRIPT

[29] At the time the Tribunal took the decisions consigned in the order to which these reasons pertain, Parliament had not yet adopted *An Act respecting further COVID-19 Measures*, S.C. 2020, c. 11,

¹¹ The CBSA can terminate investigations or make final determinations of dumping or subsidizing, in accordance with the provisions of section 41 of *SIMA*. In both cases, the Tribunal is notified of the CBSA's decision under section 41.

¹² As stated in subsection 43(1) of *SIMA*, the Tribunal must "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 shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies."

¹³ Viewed in light of the rest of the *SIMA* timelines (in sections 38, 41 and 43), the reference to 120 days is meant to inform the meaning of "forthwith after the date of receipt of notice of a final determination of dumping or subsidizing", i.e. provide an outside limit as to how much time the Tribunal has to issue its determination *upon* receiving the final determination.

¹⁴ Canada is one of only a handful of WTO Members with what is known as a "bifurcated" system for antidumping and countervailing matters – "bifurcated" indicating the split of responsibilities between the CBSA (determinations of dumping and/or subsidizing) and the Tribunal (determination of injury and causal link). All but a few trade remedies regimes around the world are "unified" systems whereby one governmental agency conducts both their equivalents of the CBSA's investigations and the Tribunal's inquiry. For the purposes of the current situation, the question of proceeding in any manner other than as the Tribunal decided to do in order to align itself with the CBSA's new schedule would not even pose itself in a non-bifurcated system.

and in particular s. 11, Part 3, *Time Limits and Other Periods Act (COVID-19)*, section 7. At the time of writing these reasons, the Tribunal does not have the benefit of any ministerial order taken under section 7, which may provide further certainty. Irrespective of any ministerial order pertaining to its responsibilities that may be taken pursuant to section 7 at a future date, the Tribunal is of the view that, by continuing its inquiry until such time that it receives notice of the CBSA's final determinations, it acted lawfully at the time that it took the decisions consigned in the order to which these reasons pertain.

Cheryl Beckett

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Presiding Member

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