Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Interim Review No. RD-2020-001

Gypsum Board

Order and reasons issued
Thursday, October 22, 2020

Canada

TABLE OF CONTENTS

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 January 4, 2017, in Inquiry No. NQ-2016-002, concerning:

CERTAIN GYPSUM BOARD, SHEET, OR PANEL ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

ORDER

Pursuant to subsections 76.01(3) and (4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal has decided not to conduct an interim review of the above finding.

Serge Fréchette

Serge Fréchette
Presiding Member

Randolph W. Heggart

Randolph W. Heggart
Member

Cheryl Beckett

Cheryl Beckett
Member

Tribunal Panel:	Serge Fréchette, Presiding Member Randolph W. Heggart, Member Cheryl Beckett, Member
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STATEMENT OF REASONS

[1] On June 8, 2020, CGC Inc. (CGC), an importer of the subject goods and a producer of gypsum board in Eastern Canada, requested that the Canadian International Trade Tribunal initiate an interim review in order to rescind the finding made by the Tribunal in Inquiry No. NQ-2016-002 (injury inquiry) concerning certain gypsum board, sheet, or panel[1] (gypsum board) originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories (the finding).

[2] CGC submitted that the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories (Western Canada), were no longer a regional market, unlike the situation found by the Tribunal at the time of the inquiry. CGC stated that considerable volumes of gypsum board produced in Eastern Canada, i.e. outside of the regional market, were sold and supplied into Western Canada, so that the legal basis for the Tribunal's finding was no longer present. CGC argued that paragraph 2(1.1)(ii) of the *Special Import Measures Act*[2] requires an assessment of the existence of a regional market on a contemporaneous basis. In other words, CGC argued that, in an interim review, the Tribunal can only consider the current supply situation and cannot consider issues such as the impact of anti-dumping duties on prices in the regional market and therefore on inflows, i.e. the existence of the regional market without anti-dumping duties.

[3] Although the exact volumes of recent shipments from Eastern to Western Canada are confidential, CGC's request describes the situation as " . . . sales in the regional market by CGC now accounting for more than one fifth of the apparent regional market in the latter portion of 2018, throughout 2019, and 2020 to date",[3] not including any sales from other Eastern Canadian producers. CGC describes this situation as a material change in circumstances, which would warrant the conduct of an interim review with a view to an eventual rescission of the finding.

[4] On July 24, 2020, the Tribunal provided the parties to the injury inquiry with a copy of CGC's request, notified them that it had determined that the request was properly documented, and set forth a schedule of submissions on whether the request should be granted.

[5] On August 10, 2020, CertainTeed Canada Inc. (CTG), the regional producer, filed submissions opposing CGC's request. In arguing that an interim review was not warranted, CTG

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1 The full product definition is as follows: gypsum board, sheet, or panel ("gypsum board") originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, composed primarily of a gypsum core and faced or reinforced with paper or paperboard, including gypsum board meeting or supplied to meet ASTM C 1396 or ASTM C 1396M or equivalent standards, regardless of end use, edge-finish, thickness, width, or length, excluding (a) gypsum board made to a width of 54 inches (1,371.6 mm); (b) gypsum board measuring 1 inch (25.4 mm) in thickness and 24 inches (609.6 mm) in width regardless of length (commonly referred to and used as "paper-faced shaft liner"); (c) gypsum board meeting ASTM C 1177 or ASTM C 1177M (commonly referred to and used primarily as "glass fiber re-enforced sheathing board" but also sometimes used for internal applications for high mold/moisture resistant applications); (d) double layered glued paper-faced gypsum board (commonly referred to and used as "acoustic board"); and (e) gypsum board meeting ISO16000-23 for sorption of formaldehyde. All dimensions are plus or minus allowable tolerances in applicable standards.

2 R.S.C., 1985, c. S-15 [*SIMA*].

3 Exhibit RD-2020-003-01, Vol. 1 at 2.

submitted that the request for an interim review should not be granted, as there had been no permanent changes to the existence of the regional market. CTG argued that the position taken by CGC was contrary to the purposes of *SIMA* and that the proper assessment was to consider whether the regional market would continue to exist if duties were removed. CTG argued that the CGC request showed that, in the absence of anti-dumping duties, the regional market would not be supplied from Eastern Canadian production to any significant degree.

[6] On August 17, 2020, Georgia-Pacific Canada LP and Georgia-Pacific Gypsum LLC filed a submission (after the deadlines set out by the Tribunal) supporting CGC's request. On August 20, 2020, CTG was permitted a right of reply to these submissions and did so on September 28, 2020.

[7] On August 31, 2020, CGC responded to CTC's submissions, reaffirming its prior arguments.

ANALYSIS

Legal standard for initiating an interim review

[8] Subsection 76.01(1) of *SIMA* provides that the Tribunal may conduct an interim review of a finding or order and that such an interim review may concern the whole finding or order, or any aspect of it. However, pursuant to subsection 76.01(3), the Tribunal cannot conduct an interim review unless the requester satisfies the Tribunal that the interim review is warranted. The Tribunal's decision is made on the basis of whether ". . . there is a reasonable indication that sufficient new relevant facts have arisen since the issuance of the existing finding or order, or that there has been sufficient change in the circumstances that led to the finding or order in question".[4]

[9] Such facts or changed circumstances must also be ". . . sufficiently compelling to indicate that an interim review, if conducted, would likely result in the Tribunal's order or finding being amended."[5]

[10] The Tribunal finds that the facts outlined in CGC's request do not meet this standard and, as such (and as explained in more detail below), the Tribunal will not conduct an interim review of its finding.

An interim review is not warranted in this case

[11] The provision at the centre of the request, i.e. paragraph 2(1.1) of *SIMA*, which applies in injury inquiries and reviews, states as follows:

> (1.1) In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where
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> . . .

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4 *Certain Fasteners* (24 October 2008), RD-2008-001 (CITT) at para. 18; *Canadian International Trade Tribunal Rules*, SOR/91-499, as amended, rule 72.

5 *Aluminum Extrusions* (12 September 2013), RD-2011-005 (CITT) at para. 22; see also *Machine Tufted Carpeting* (21 August 2000), RD-2000-001 (CITT) at 3.

> **(b)** *the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada*.
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> [Emphasis added]

In the present case, the Tribunal is not convinced that the facts and arguments presented by CGC are such that they warrant an interim review.

[12] Even if the facts outlined in CGC's request can be said to constitute a change in circumstances regarding supply from Canada outside of the regional market (which, given the prior history of shipments in the latter part of the original period of inquiry (POI), is a disputable proposition), this development is not sufficiently compelling and would not likely result in a rescission of the finding.

[13] The Tribunal directly addressed the proper interpretation of these provisions in the reasons for its decision in the injury inquiry. Opposing parties in the inquiry argued against the existence of a regional market, using an argument that is similar to the one made by the applicant in the present request. The Tribunal made the following statement in its reasons rejecting that argument:

> Opposing parties also submitted that the Tribunal should base its analysis of whether a regional market exists on data during and subsequent to the POI. Opposing parties advanced that, after the imposition of provisional duties, a shift in demand in Western Canada occurred, leading to a substantial inflow of gypsum board from Eastern Canada. They argued that, on this "dynamic" basis, the Tribunal should conclude that a regional market does not exist in Western Canada. While the Tribunal does not treat the assessment of a regional market as purely a mathematical exercise based entirely on the POI (indeed, the assessment is sometimes referred to as "an art, not a science"), the Tribunal does not accept the above proposition of the opposing parties.
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> . . .
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> As well, a "dynamic" analysis of whether there is a regional market becomes a self-fulfilling prophecy after the imposition of provisional duties, i.e. a situation the dynamics of which will usually tend to negate the appearance of a regional market. This is because, as prices rise, inflows (being shipments from Canada outside of the regional market) will usually increase, as they have done in this case. This is a consequence of the duties; to rely on this phenomenon to assess whether there is a regional market or not would undermine the very purpose of subsections 2(1) of *SIMA* and is therefore misguided. *The proper test is to look at the behaviour of the market in the absence of duties.*[6]
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> [Footnotes omitted, emphasis added]

[14] In the Tribunal's view, and as it has previously expressed in its decision in the injury inquiry, it is an expected consequence of anti-dumping orders that affected commercial parties may find themselves in a position where they must adjust their business practices, including selling products from their Canadian operations instead of operations in subject countries. Anti-dumping protection, which is not intended to be permanent, is in effect *a result* of the existence of the regional market.

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6 *Gypsum Board* (4 January 2017), NQ-2016-002 (CITT) at paras. 59, 61.

[15] In that context, only where changes to regional supply are sufficiently independent from the existence of the anti-dumping measure, and are demonstrated to result from normal changes to the market and economic conditions that existed at the time of the initial examination, could the Tribunal conclude that the basis against which the injury was originally assessed has changed, that there may no longer be a regional market for the goods and, to a degree, that protection may no longer be justified.

[16] Here, CGC has not provided any evidence that the shipments from Eastern Canada to Western Canada are the result of anything other than the imposition of anti-dumping duties on the subject goods. Further, it has provided no evidence that such shipments would continue in the absence of duties. On the contrary, CGC's request states as follows:

> Prior to the imposition of the tariffs on imported gypsum wallboard, CGC primarily supplied its Western Canada customers with wallboard made at the production facilities of its sister company located in the Pacific Northwest and Midwest United States. This is because it is more cost efficient to produce and ship wallboard from those plants to CGC's Western Canada customers.[7]

[17] No change to such market dynamics, independent from the existence of the anti-dumping measure (i.e. a change that reflects the normal market and economic conditions of the market itself as opposed to the existence of the protection), was alleged by CGC in its request.

[18] The Tribunal's finding of a regional market was not a conclusion regarding a temporary situation. It would be incorrect to now find a lack of a regional market based on events which are not connected to the normal or ordinary conditions of that market and appear to be nothing more than a mere reflection of what would ideally be a temporary condition that resulted from anti-dumping protection.

[19] CGC's proposition is based mostly on the present tense used in the applicable provision, i.e. that ". . . demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada" [emphasis added]. The Tribunal does not find this persuasive. The provision must be read in the context of the statutory scheme of *SIMA*.

[20] Paragraph 2(1.1) of *SIMA* establishes the basis upon which, in certain circumstances, an injury analysis is conducted. It circumscribes the geographical market within which market and economic conditions will be examined. During an injury inquiry, such a market will exist at a time absent of anti-dumping protection, i.e. when market conditions are not influenced by that protection. If anti-dumping protection is afforded to the domestic producers in that regional market, it is as a consequence of the dumping practice in those conditions. According to *SIMA*, anti-dumping protection will be afforded for the duration of the order. There is no reason to attribute the fulfillment of demand in this context to a transient situation occurring at this moment or to any other temporary circumstance. As indicated above, the order will not be reviewed unless there are changes in circumstances that are sufficiently compelling to indicate that the review would likely result in the Tribunal's order or finding being amended.

[21] The Tribunal typically assesses injury during a three-year POI to avoid reaching conclusions based on transient data caused by the application of provisional duties. In arriving at its finding that

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7 Exhibit RD-2020-003-01 at 15.

there was a regional market, the Tribunal considered a three-year, as well as an additional half-year, period. This POI is the very context for its finding.

[22] Other than a purported increase in these shipments since the injury inquiry, there is no evidence whatsoever of any change in circumstances. The Tribunal finds no structural change in the circumstances which led the Tribunal to find injury in the injury inquiry and concludes that this is an insufficient factual basis on which to initiate an interim review.

[23] Based on the foregoing, CGC has failed to convince the Tribunal that there is a reasonable indication that there is no longer a regional market for the subject and like goods, and that it is likely that the Tribunal would rescind its finding as a result. Therefore, the Tribunal is not convinced that it should conduct an interim review.

DECISION

[24] Pursuant to subsections 76.01(3) and (4) of *SIMA*, the Tribunal has decided not to conduct an interim review of its finding.

Serge Fréchette

Serge Fréchette
Presiding Member

Randolph W. Heggart

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