



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2010-039

BMI Canada Inc. and BMI West  
Inc.

v.

President of Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, August 2, 2011*

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IN THE MATTER OF an appeal heard on April 5, 2011 pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF 34 decisions of the President of the Canada Border Services Agency, dated August 11, 2010, with respect to requests for re-determination pursuant to section 59 of the *Special Import Measures Act*.

**BETWEEN**

**BMI CANADA INC. AND BMI WEST INC.**

**Appellants**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is dismissed

Diane Vincent  
Diane Vincent  
Presiding Member

Pasquale Michael Saroli  
Pasquale Michael Saroli  
Member

Stephen A. Leach  
Stephen A. Leach  
Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Date of Hearing: April 5, 2011

Tribunal Members: Diane Vincent, Presiding Member  
Pasquale Michael Saroli, Member  
Stephen A. Leach, Member

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**PARTICIPANTS:****Appellants**

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**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

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BMI Canada Inc.

Martin Bouthillette  
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by BMI Canada Inc. and BMI West Inc. (BMI) pursuant to subsection 61(1) of the *Special Import Measures Act*<sup>1</sup> from decisions of the President of the Canada Border Services Agency (CBSA) dated August 11, 2010, with respect to 34 re-determinations under section 59.

2. Subsection 61(3) of *SIMA* provides that, on any appeal under subsection 61(1), the Tribunal may “. . . make such order or finding as the nature of the matter may require and . . . declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken . . .” In the present circumstances, the Tribunal must determine whether certain pipe fittings imported into Canada by BMI from the People’s Republic of China (China) (the goods in issue) are of the same description as the goods subject to the Tribunal’s findings (the subject goods) in *Copper Pipe Fittings*<sup>2</sup> (the findings) and, therefore, subject to the imposition of anti-dumping duties.

3. A secondary issue arising from this appeal stems from BMI’s submission that, should the Tribunal find that the goods in issue are subject to the findings, the Tribunal should recommend to the Minister of Finance that a remission order in respect of the anti-dumping duties be sought pursuant to section 115 of the *Customs Tariff*.<sup>3</sup>

4. BMI also submitted that, in the event that the Tribunal finds that the goods in issue are of the same description as the subject goods, it should order the CBSA to waive the additional GST on the anti-dumping duties and interest on such GST, which BMI finds punitive in the present appeal, given that there was no intent to engage in inappropriate activities.

5. Finally, BMI submitted that one of the CBSA’s 34 re-determinations was made outside of the statutory limitation period.

### TRIBUNAL’S FINDINGS

6. The findings describe the subject goods as follows:

. . . solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, for use in heating, plumbing, air conditioning and refrigeration applications, restricted to the products enumerated in the appendix to these findings (copper pipe fittings), originating in or exported from . . . the People’s Republic of China . . . .

7. The findings contain an appendix which, in turn, contains 17 tables that list 1,141 products that are subject to the findings. The preamble to the tables indicates the following:

1. The tables to this appendix list, by product category, the copper pipe fittings that are covered by the Tribunal’s findings. Where an asterisk (\*) follows a specific copper pipe fitting description, it indicates that both wrought and cast copper pipe fittings are covered by the Tribunal’s findings.

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

2. (19 February 2007), NQ-2006-002 (CITT) [*Copper Pipe Fittings*].

3. S.C. 1997, c. 36.

2. Copper pipe fittings are identified in terms of imperial measurement, i.e. inches. However, the metric equivalents of the imperial measurement are also covered by the Tribunal's findings. The term "metric equivalent" refers to those copper pipe fittings that are soft converted equivalents of the imperial-sized copper pipe fittings and does not include fittings that are made specifically in metric dimensions. Copper pipe fittings are also identified in terms of nominal size.

3. Copper pipe fittings are identified in the tables to this appendix using the following abbreviated terms:

Abbreviation Chart			
WP	Wrought Pressure	FTG	Fitting End (Street End)
WD	Wrought Drainage	LT	Long Turn
CP	Cast Pressure	MJ	Mechanical Joint
CD	Cast Drainage	DE	Drop Ear
C	Copper Tube Cupped End or Sweat End	DWV	Drainage Waste, Vent
M	Male NPT Thread	TY	90° Drainage Tee
FE	Female NPT Thread	Y	45° Drainage Tee
SJ	Slip Joint End		

## GOODS IN ISSUE

8. The goods in issue comprise 11 models of pipe fittings. Nine models of the pipe fittings are described by BMI as bronze pipe fittings. The remaining two models of pipe fittings are characterized by BMI as copper goods.

9. The CBSA determined that the goods in issue are described in the appendix to the findings and that anti-dumping duties were payable on the goods in issue.

10. According to the parties, the goods in issue are properly described as follows:<sup>4</sup>

Exhibit No.	BMI Item No.	BMI Product No.	BMI Product Description	CBSA's Classification in the Appendix to the Findings
B-01	1	21105 <sup>5</sup>	-----	-----
B-02	2	21106 <sup>6</sup>	-----	-----
B-03	3	-----	-----	-----
B-04	4	-----	-----	-----
B-05	5	-----	-----	-----

4. Tribunal Exhibit AP-2010-039-06A (protected) at paras. 3-4; Tribunal Exhibit AP-2010-039-12B (protected) at para. 44. BMI product numbers, BMI product descriptions and the CBSA's classification of the goods in issue in the appendix were filed with the Tribunal pursuant to the confidentiality provisions set out at section 46 and following of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

5. During the public hearing, Mr. Michel Bond, the witness for BMI, identified this product number as being comparable to item number WP-33-12 of Cello Products Inc. (Cello). Mr. Bond further indicated as follows: "The description is 3/4" CXC pressure—it is press, but that is an abbreviation for pressure—union." *Transcript of Public Hearing*, 5 April 2011, at 18.

6. During the public hearing, Mr. Bond stated as follows: "... 'Cello Products Inc.' The item number is WP33-16. The description is 1" CXC pressure union." Mr. Bond further indicated that BMI product No. 21106 was comparable to this Cello product. *Transcript of Public Hearing*, 5 April 2011, at 19-20.

B-07	6	[REDACTED]	[REDACTED]	[REDACTED]
B-08	7	[REDACTED]	[REDACTED]	[REDACTED]
B-06	8	[REDACTED]	[REDACTED]	[REDACTED]
B-09	9	[REDACTED]	[REDACTED]	[REDACTED]
B-11 <sup>7</sup>	10	[REDACTED]	[REDACTED]	[REDACTED]
B-10	11	[REDACTED]	[REDACTED]	[REDACTED]

## PROCEDURAL HISTORY

11. The goods in issue were imported into Canada under 34 transactions between May 3, 2007, and February 23, 2009.

12. The CBSA issued a Detailed Adjustment Statement for each transaction on May 13, 2009, and determined, pursuant to section 57 of *SIMA*, that the goods in issue were in fact of the same description as the subject goods.

13. On August 10, 2009, BMI requested re-determinations of the duties assessed by the CBSA on 13 imported products pursuant to section 58 of *SIMA*.

14. On August 11, 2010, the CBSA granted a re-assessment on two products and maintained its re-determinations under section 59 of *SIMA* on 11 products.

15. On October 12, 2010, BMI filed an appeal with the Tribunal pursuant to subsection 61(1) of *SIMA*.

16. On March 28, 2011, BMI filed six exhibits, including one BMI part and five Cello parts.<sup>8</sup> On April 1, 2011, the Tribunal sought clarification on the goods in issue. It requested that BMI identify which of the filed exhibits consisted of the goods in issue and to confirm that the laboratory reports<sup>9</sup> submitted by the CBSA covered the goods in issue. BMI responded that it was not in position to confirm that the laboratory reports covered the goods in issue. In response to BMI, the CBSA clarified that the laboratory reports pertained to 9 of the 11 models of the goods in issue and that, for the sake of convenience, it offered a chart with the laboratory report numbers and the corresponding BMI product codes.

7. Tribunal Exhibit AP-2010-039-23 (protected). Items 10 and 11 are inverted on the list of exhibits. Tribunal Exhibit AP-2010-039-027A (protected) lists the part numbers according to BMI product numbers.

8. Exhibits A-1 to A-6.

9. Tribunal Exhibit AP-2010-039-12B (protected), tab G. The laboratory reports were filed with the Tribunal pursuant to the confidentiality provisions set out at section 46 and following of the *CITT Act*.

17. BMI confirmed that it only had one of the models of the goods in issue in stock, Exhibit A-04, and that it submitted a competitor's parts to illustrate the following:<sup>10</sup>

A-01	Cello product code WP 33-12 to illustrate BMI product No. 21105
A-02	Cello product code WP 33-16 to illustrate BMI product No. 21106
A-03	Cello product code WP 33-20 to illustrate BMI product No. [REDACTED]
A-04	BMI part No. [REDACTED] (goods in issue)
A-05	Cello product code WP 33-20 (single) to illustrate BMI product No. [REDACTED]
A-06	Cello product code WP 33-24 to illustrate BMI product No. [REDACTED]

18. The Tribunal held a public hearing in Ottawa, Ontario, on April 5, 2011.

19. On April 5, 2011, prior to the commencement of the hearing, the CBSA filed the following exhibits as a follow-up to the Tribunal's request to clarify the goods in issue in relation to the laboratory reports submitted by the CBSA:

<b>Exhibit No.</b>	<b>Description</b>
B-01	BMI product No. [REDACTED]
B-02	BMI product No. [REDACTED]
B-03	BMI product No. [REDACTED]
B-04	BMI product No. [REDACTED]
B-05	BMI product No. [REDACTED]
B-06	BMI product No. [REDACTED]
B-07	BMI product No. [REDACTED]
B-08	BMI product No. [REDACTED]
B-09	BMI product No. [REDACTED]
B-10	BMI product No. [REDACTED]
B-11	BMI product No. [REDACTED]

20. The CBSA held that the exhibits were samples of the goods in issue provided by BMI in the course of the re-determination process. BMI was provided time before the hearing to examine these exhibits to verify that they were the goods in issue.<sup>11</sup> BMI agreed that Exhibits B-01 to B-11 were the goods in issue. The Tribunal accepted the late filing of these exhibits into evidence on the basis that they would assist the Tribunal in making its determination in this appeal.

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10. Tribunal Exhibit AP-2010-039-21.

11. *Transcript of Public Hearing*, 5 April 2011, at 8-9.



21. Two witnesses appeared on behalf of BMI: Mr. Michel Bond, Vice-President of Sales, BMI Canada Inc., and Mr. Martin Bouthillette, buyer for BMI Canada Inc. The CBSA called no witnesses.

## ANALYSIS

### Statutory Framework

22. Section 61 of *SIMA* provides as follows:

**61.** (1) Subject to section 77.012 or 77.12, a person who deems himself aggrieved by a re-determination of the [CBSA] made pursuant to section 59 with respect to any goods may appeal therefrom to the Tribunal by filing a notice of appeal in writing with the [CBSA] and the Secretary of the Tribunal . . . .

...

(3) On any appeal under subsection (1), the Tribunal may make such order or finding as the nature of the matter may require and, without limiting the generality of the foregoing, may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken, and an order, finding or declaration of the Tribunal is final and conclusive subject to further appeal as provided in section 62.

**61.** (1) Sous réserve des articles 77.012 et 77.12, quiconque s'estime lésé par un réexamen effectué en application de l'article 59 peut en appeler au Tribunal en déposant, auprès [de l'ASFC] et du secrétaire du Tribunal [...] un avis d'appel.

[...]

(3) Le Tribunal, saisi d'un appel en vertu du paragraphe (1), peut rendre les ordonnances ou conclusions indiquées en l'espèce et, notamment, déclarer soit quels droits sont payables, soit qu'aucun droit n'est payable sur les marchandises visées par l'appel. Les ordonnances, conclusions et déclarations du Tribunal sont définitives, sauf recours prévu à l'article 62.

23. Anti-dumping duties are payable when goods imported into Canada are of the same description as the goods in respect of which the Tribunal has made an order or finding under section 43 of *SIMA*. Subsection 3(1) provides 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 . . . a duty as follows:

(a) in the case of dumped goods, an anti-dumping duty in an amount equal to the margin of dumping of the imported goods; and

...

**3.** (1) Sous réserve de l'article 7.1, les marchandises sous-évaluées ou subventionnées importées au Canada alors que le Tribunal a établi avant leur dédouanement, par ordonnance ou dans ses conclusions, que le dumping ou le subventionnement de marchandises de même description a causé un dommage [...] sont assujetties aux droits suivants :

a) dans le cas de marchandises sous-évaluées, des droits antidumping d'un montant égal à la marge de dumping des marchandises;

[...]

24. Section 43 of *SIMA* provides that the Tribunal has the authority to make an order or finding pursuant to *SIMA* in the following manner:

**43.** (1) In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall, forthwith after the date of receipt by the Secretary 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 by the Secretary 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 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. Ces ordonnances ou conclusions sont rendues dès réception par le secrétaire de l'avis de cette décision définitive mais, au plus tard, dans les cent vingt jours suivant la date à laquelle le secrétaire reçoit l'avis de décision provisoire.

## Positions of Parties

### BMI

25. BMI claimed that the goods in issue are not of the same description as the subject goods on the basis that the BMI product descriptions differ from those supplied by the CBSA.

26. BMI submitted that it could not locate a description of the goods in issue in the appendix to the findings, which led it to believe that they were not of the same description as the subject goods. BMI argued that the goods in the appendix to the findings are listed according to categories and that it could not locate a category for waste connectors. BMI also submitted that, given that the subject goods are listed according to size and dimension, if the size is not included in the appendix to the findings, the goods in issue are not of the same description as the subject goods.<sup>12</sup>

27. BMI submitted that the findings concern “soldered pipe fittings” and that some of the goods in issue, being made of multiple parts, such as unions and waste connectors, are not soldered. Therefore, it claimed that these pipe fittings do not meet the “solder” requirement and cannot be on the list of subject goods.<sup>13</sup>

28. BMI further submitted that the appendix to the findings does not appear to cover products that comprise multiple parts. Unions, Exhibits B-01 to B-05, and waste connectors, Exhibits B-08 and B-09, are made of multiple parts, which, BMI contended, could not be located on the list of subject goods as either parts or complete fittings.<sup>14</sup>

29. BMI also argued that the appendix to the findings is ambiguous. For instance, the meaning of “DWV” is not associated with “CD” or “WD” in the abbreviation chart. BMI claimed that associating “DWV” with “CD” or “WD” renders the abbreviation chart meaningless because DWV fittings do more than drainage.<sup>15</sup>

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12. *Ibid.* at 142-43, 169, 174-75.

13. *Ibid.* at 180.

14. *Ibid.* at 156.

15. *Ibid.* at 174.

30. BMI further claimed that the use of the asterisk (\*) in the appendix to the findings to denote that both wrought and cast copper pipe fittings are covered by the findings leads to confusion and ambiguity. For instance, BMI submitted that, in certain circumstances, both wrought and cast products are shown with an asterisk instead of one of the two. BMI submitted that the use of the asterisk throughout the list indicates, at times, cast pipe fittings which are not made in the industry or not known to exist in the marketplace. BMI questioned whether the appendix to the findings was meant to cover all pipe fittings inclusively or only the subject goods.<sup>16</sup>

31. BMI submitted that the product descriptions used by the domestic producers in *Copper Pipe Fittings* differed from the product descriptions in the findings.<sup>17</sup> BMI argued that the CBSA's instructions, at the time of the preliminary injury inquiry and its final determination, were vague in regard to the use of the asterisk in the list of subject goods and that any error for failure to follow these instructions is not BMI's responsibility but that of officials.<sup>18</sup>

32. BMI cited *GFT Mode Canada Inc. v. Deputy M.N.R.*<sup>19</sup> to support its submission that the CBSA did not meet the onus of proof in this appeal. In its order, the Tribunal stated the following:

Regarding the onus of proof, tax cases confirm that the appellant bears the burden of proof with respect to the assumptions made by the respondent in making his assessment. However, they also indicate that the respondent bears the onus of proof with respect to the assumptions raised for the first time.<sup>20</sup>

[Footnotes omitted]

33. BMI argued that it could not have requested product exclusions for the goods in issue, given that it did not believe that the goods in issue were covered by the findings.<sup>21</sup>

34. For the same reason, BMI argued that it was not in a position to seek an interim review, as interim reviews are only conducted in respect of goods that are covered by Tribunal findings.<sup>22</sup>

35. BMI submitted the current procedure, an appeal process, is the proper course of action to challenge re-determinations, as it provides an opportunity to demonstrate that the goods in issue are not of the same description as the subject goods and to clarify the findings, which, it argues, are ambiguous.<sup>23</sup>

36. BMI argued that the findings do not include "bronze" pipe fittings and that "copper alloy" does not mean "any copper alloy". It submitted that the Tribunal's findings include copper, wrought copper pipe fittings made from copper pipe and copper and brass cast pipe fittings. It argued that the findings do not mention "bronze" pipe fittings. BMI cited paragraph 164 of the statement of reasons in *Copper Pipe Fittings* to compare the cost of bronze and that of brass,<sup>24</sup> and it submitted that bronze did not compete with brass based on price differential and cannot be found to have caused injury to the domestic market.<sup>25</sup>

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16. Tribunal Exhibit AP-2010-039-06B at paras. 114-17.

17. *Transcript of Public Hearing*, 5 April 2011, at 159.

18. Tribunal Exhibit AP-2010-039-06B at para. 118.

19. (18 May 2000), AP-96-046 and AP-96-074 (CITT) [*GFT Mode*].

20. *GFT Mode* at 7.

21. *Transcript of Public Hearing*, 5 April 2011, at 160-61.

22. *Ibid.* at 162.

23. *Ibid.* at 153.

24. *Ibid.* at 165-68.

25. *Ibid.* at 168.

37. Finally, in support of its submission that “bronze” pipe fittings are not subject to the findings, BMI noted that, in *Zellers Inc. v. Deputy M.N.R.*,<sup>26</sup> the Tribunal determined that bicycles with wheel diameters of 15.5 in. were not goods subject to a previous Tribunal finding<sup>27</sup> on the basis of the following:<sup>28</sup>

... When a precise measurement such as “16 inches (40.64 cm)” is used to define the lower end of a range of sizes of goods covered by a finding, such as in the finding in *Bicycles*, the Tribunal is of the view that it must be interpreted literally. To do anything else is to invite confusion and uncertainty in the administration of the finding and, as pointed out by counsel for the appellant, leads to the result that the coverage of the finding can be varied virtually at the discretion of the Deputy Minister. . . .

...

Both the complainants in Inquiry No. NQ-92-002 regarding imports of bicycles and the Revenue Canada officials who drafted the preliminary and final determinations of dumping could, in the Tribunal’s view, have foreseen a move to “non-standard” sizes in the event of an injury finding and the imposition of anti-dumping duties on imports of bicycles with wheel diameters of 16 in. If this had been a concern, the Revenue Canada officials could have structured the description of the goods in the preliminary and final determinations so as to cover all bicycles with wheels diameters greater than what was then the next smallest “standard” size, i.e. all bicycles with wheel diameters greater than 14 in., or the complainants could have raised the matter during proceedings before the Tribunal prior the issuance of its finding. . . .<sup>29</sup>

38. Regarding the secondary issue relating to taxation, which is discussed later, BMI suggested that a similar approach to the teleological approach to tax interpretation invoked in *Zellers*<sup>30</sup> should be taken in this case:

The teleological approach provides that the interpretation of tax legislation should follow the ordinary rules of interpretation and that a legislative provision should be given a strict or liberal interpretation depending on the underlying purpose, as determined from the context of the statute, its objective and the legislative intent. Moreover, only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the presumption in favour of the taxpayer. . . .

[Footnote omitted]

39. Similarly, BMI submitted that, if the Tribunal finds a reasonable doubt in the present appeal, recourse should be in its favour.<sup>31</sup>

#### CBSA

40. The CBSA submitted that the goods in issue are goods of the same description as the subject goods and that conducting re-determinations on imported goods is part of its mandate to enforce the Tribunal’s findings.

41. The CBSA argued that paragraphs 1 and 3 of the statement of reasons to the findings clearly indicate that copper pipe fittings for use in heating, plumbing, air conditioning and refrigeration applications are considered to be dumped goods in Canada. The CBSA further argued that the wording of the findings is very specific and covers “. . . solder [joint] pressure pipe fittings and solder joint drainage, waste and [vent]

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26. (25 January 1996), AP-94-351 (CITT) [*Zellers*].

27. *Bicycles and Frames* (11 December 1992), NQ-92-002 (CITT).

28. Tribunal Exhibit AP-2010-039-06C, tab 17; *Transcript of Public Hearing*, 5 April 2011, at 141.

29. *Zellers* at 9, 10.

30. Tribunal Exhibit AP-2010-039-06C, tab 17.

31. Tribunal Exhibit AP-2010-039-06B at para. 120.

pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper . . .”<sup>32</sup> The CBSA also noted that the Tribunal previously determined, in Inquiry No. NQ-93-001,<sup>33</sup> that all types of copper pipe fittings form a single class of goods, a finding that was subsequently upheld by a binational panel in 1995.<sup>34</sup>

42. The CBSA submitted that, in *Deputy M.N.R. (Customs and Excise) v. Trane Company of Canada, Ltd.*,<sup>35</sup> the Federal Court of Appeal, reviewing a decision of the Tariff Board, found that “the final determination of dumping applies to the goods described in the Tribunal’s Order or finding”<sup>36</sup> and that, in order to clarify the terms of a decision which are not clear, “. . . it is permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal.”<sup>37</sup> The CBSA added that the same conclusion was reached in *J.V. Marketing Inc. v. International Trade Tribunal (Can.)*,<sup>38</sup> where the Federal Court determined that, when the description of goods is ambiguous, reference can be made to the extended definition of the goods in the statement of reasons of a finding.

43. The CBSA submitted that the issue before the Tribunal in this appeal is not the language in the appendix to the findings, but whether the goods in issue are of the same description as the subject goods.

44. The CBSA noted that the appendix to the findings is not based on Cello’s list of products, but on the CBSA’s market analysis of exporters to Canada. The way in which the subject goods are listed in the appendix does not reflect a particular importer’s description versus the descriptions of other importers.<sup>39</sup>

45. The CBSA added that, following the complaint that it received and in the course of its subsequent investigation leading to the Tribunal’s injury inquiry, it sent two requests for information to BMI seeking contact information for BMI’s foreign vendors. BMI, in its response, identified one exporter from a source country as one of its vendors.<sup>40</sup> Under testimony, Mr. Bond said that this conversation could possibly have taken place with his business partner, and Mr. Bouthillette did not recall having this conversation with a CBSA officer.<sup>41</sup>

46. The CBSA submitted that the statement of reasons noted that pipe fittings, although identified as “one single class of goods”, were not “identical in all respects to each other” but shared similar physical and market characteristics. Domestically produced goods that are identical to the subject goods also share these similar characteristics. The CBSA added that the findings were not based on the composition of copper alloys but on industry practice, which markets the goods in issue as “pipe fittings”.<sup>42</sup>

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32. *Transcript of Public Hearing*, 5 April 2011, at 205.

33. *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper* (18 October 1993) (CITT).

34. Tribunal Exhibit AP-2010-039-12A at para. 53.

35. [1982] 2 F.C. 194 [*Trane*]; Tribunal Exhibit AP-2010-039-06C, tab 23 at 529.

36. *Trane Company of Canada Limited v. The Deputy Minister of National Revenue for Customs (1980)*, 7 T.B.R. 126.

37. Tribunal Exhibit AP-2010-039-12A, tab 4 at para. 22.

38. (29 November 1994), A—1349—92 (F.C.A.); Tribunal Exhibit AP-2010-039-06C, tab 21.

39. *Transcript of Public Hearing*, 5 April 2011, at 208, 212; Tribunal Exhibit AP-2010-039-12A at paras. 55-58.

40. Tribunal Exhibit AP-2010-052-12B (protected), tab H; *Transcript of Public Hearing*, 5 April 2011, at 209.

41. *Transcript of in Camera Hearing*, 5 April 2011, at 6.

42. Tribunal Exhibit AP-2010-039-12A at para. 72.

47. On the subject of multiple-part pipe fittings, the CBSA submitted that multiple parts that form a single fitting are described, in the appendix to the findings, as subject goods. The CBSA argued that it follows that, if goods formed by multiple parts, when assembled, are goods found in the appendix to the findings, even if the parts are not listed individually, then they are subject goods.<sup>43</sup>

48. The CBSA noted that Mr. Bond, who appeared on behalf of BMI, was not an expert witness, which may explain why he did not recognize some of the descriptions in the appendix to the findings. The CBSA added that BMI's concern in relation to "bronze" pipe fittings may have been better addressed in a formal interim review process or in a request for the exclusion of a product from the findings.

49. Addressing BMI's argument that products made of bronze are not subject to the findings, the CBSA argued that "bronze" is recognized as a copper alloy by the American Society of Mechanical Engineers (ASME) and ASTM International, the official standard adopted by the Tribunal and referenced in the statement of reasons under the title "Product Definition". The CBSA added that Chapter 74, Subheading Note (1) of the *Customs Tariff* also provides a definition for both "brass" and "bronze" under copper alloys.<sup>44</sup>

50. The CBSA added that laboratory reports confirmed that, on the basis of the legal notes to the *Customs Tariff* and the ASME requirement for "bronze", five of BMI's exhibits are not "bronze" pipe fittings -----.<sup>45</sup>

51. The CBSA submitted that "bronze pipe fittings" are discussed at paragraph 164 of the statement of reasons to the findings in terms of Cello's bronze fittings commanding a higher price than those of BMI made of cast brass. The CBSA claimed that this discussion indicates that bronze pipe fittings are included in the findings.

### **Tribunal Analysis**

52. As a preliminary note, the Tribunal observes that several new arguments were presented by BMI over the course of the hearing. The CBSA, while not objecting to the presentation of these new arguments, did note, during and at the close of the hearing, that it would have considered bringing evidence in response to the newly raised arguments had it known about them in advance.<sup>46</sup> As there is no objection on the record, the Tribunal will consider these arguments in the analysis that follows.

53. First, the Tribunal must address the timeliness of one of the CBSA's 34 re-determinations in respect of the goods in issue.

54. Second, the Tribunal must determine whether the goods in issue are subject to the findings. In this regard, it must determine if each of the goods in issue is of the same description as the subject goods listed in the appendix to the findings. In doing so, it will consider whether bronze is a copper alloy.

55. Third, the Tribunal will address the two subsidiary issues raised by BMI, i.e. the request that the Tribunal recommend that the Minister of Finance consider a remission order in respect of the anti-dumping duties and the request that the Tribunal issue an order to waive the GST and interest payable on the GST.

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43. *Transcript of Public Hearing*, 5 April 2011, at 215.

44. *Ibid.* at 207; Tribunal Exhibit AP-2010-039-12A at 6.

45. *Transcript of Public Hearing*, 5 April 2011, at 209; Tribunal Exhibit AP-2010-039-12B (protected), tab G at para. 22.

46. *Transcript of Public Hearing*, 5 April 2011, at 202, 213.

Timeliness

56. Section 57 of the *SIMA* provides as follows:

**57.** Unless the President has previously re-determined under section 59 a determination referred to in subsection 56(1) or (2) . . . a designated officer may re-determine the determination

(a) in accordance with a request made under subsection 56(1.01) or (1.1); or

(b) if the designated officer deems it advisable, *within two years after the determination.*

**57.** Sauf si le président a réexaminé, conformément à l'article 59, une décision rendue en vertu du paragraphe 56(1) ou (2) [...] l'agent désigné peut la réviser :

a) soit à la suite d'une demande faite en application des paragraphes 56(1.01) ou (1.1);

b) soit, de sa propre initiative, *dans les deux ans suivant la décision.*

[Emphasis added]

57. In this regard, subsection 56(1) of *SIMA* provides as follows:

**56.** (1) Where, subsequent to the making of an order or finding of the Tribunal or an order of the Governor in Council imposing a countervailing duty under section 7, any goods are imported into Canada, **a determination by a customs officer**

(a) as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies,

...

made within thirty days after they were accounted for under subsection 32(1), (3) or (5) of the *Customs Act* is final and conclusive.

**56.** (1) Lorsque des marchandises sont importées après la date de l'ordonnance ou des conclusions du Tribunal ou celle du décret imposant des droits compensateurs, prévu à l'article 7, est définitive **une décision rendue par un agent des douanes** dans les trente jours après déclaration en détail des marchandises aux termes des paragraphes 32(1), (3) ou (5) de la *Loi sur les douanes* et qui détermine :

a) la question de savoir si les marchandises sont de même description que des marchandises auxquelles s'applique l'ordonnance ou les conclusions, ou le décret;

[...]

[Bold added for emphasis]

58. Where an *actual* determination is *not* made by a customs officer within 30 days under subsection 56(1) or (2) of *SIMA*, the determination is automatically *deemed* to have been made on the 30th day after the goods were accounted for:

**56.** (2) Where, in the case of any imported goods referred to in subsection (1), a *determination* referred to in that subsection that is relevant in the case of those goods *is not in fact made* in respect of them *within the thirty days* referred to in that subsection, that *determination shall be deemed to have been made*

(a) on the thirtieth day after the goods were accounted for; and

(b) in accordance with any representations made by the person accounting for the goods at the time of the accounting.

**56.** (2) À *défaut de décision* quant aux marchandises importées visées au paragraphe (1) *dans les trente jours* mentionnés à ce paragraphe, *une telle décision est réputée avoir été rendue* :

a) le trentième jour suivant la déclaration en détail des marchandises;

b) conformément aux représentations faites lors de la déclaration en détail par l'auteur de celle-ci.

[Emphasis added]

59. As noted in the excerpt above, section 57 of *SIMA* requires that a designated officer make a re-determination within two years of the date of determination. BMI submitted that the re-determinations were issued on May 14, 2009. It argued that, as the first importation of the goods in issue occurred on May 3, 2007, the CBSA was consequently statute-barred from making re-determinations on importations made prior to May 13, 2007.<sup>47</sup> BMI contends that, by virtue of the two-year limitation period in section 57, the CBSA's May 14, 2009, re-determinations were time-barred from extending to goods imported before May 13, 2007.

60. The CBSA submitted that section 57 of *SIMA* provides the authority for a designated officer to make a re-determination within two years after the goods are accounted for. The CBSA noted that the earliest date of accounting for the goods in issue was May 3, 2007. As the determination was not made within 30 days, it was deemed to have been made on the 30th day after the goods were accounted for, that is, June 2, 2007. Accordingly, the CBSA submitted that the end of the statutory period was June 2, 2009, and that its re-determinations were issued on May 13, 2009, therefore, within the statutory period.<sup>48</sup>

61. The Tribunal finds that the goods in issue were the subject of a June 2, 2007, deemed determination under subsection 56(2) of *SIMA*. Consequently, the May 13, 2009, re-determinations in respect of those goods are within the two-year time limit for re-determinations under section 57. In other words, for time limit purposes, it is not the entries themselves that are being re-determined, but rather the actual determination pursuant to subsection 56(1) or, in the absence thereof, the deemed determination pursuant to subsection 56(2) in respect of those entries. The Tribunal therefore disagrees with BMI's contention that the re-determinations regarding imports between May 3 and 13, 2007, were outside the two-year limitation period.

#### Are the Goods in Issue Subject to the Findings?

62. The Tribunal will now examine whether the goods in issue are subject to the findings. It will examine whether bronze is a copper alloy and then examine the list of goods in the appendix to the findings in relation to each of the goods in issue.

#### – Is Bronze a Copper Alloy?

63. The Tribunal notes that the findings describe the subject goods as pipe fittings made of cast copper alloy and wrought copper alloy.

64. BMI submitted that nine of the goods in issue were made of bronze<sup>49</sup> and that the findings only apply to copper and brass fittings. It further argued that "copper alloy" did not mean "any copper alloy", that the findings only related to brass goods, that bronze was not specifically mentioned in the findings or the statement of reasons and that copper alloy was not specified in the complaint.<sup>50</sup>

65. The Tribunal notes that, according to the laboratory reports, four of the goods in issue are in fact made of bronze.<sup>51</sup>

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47. Tribunal Exhibit AP-2010-039-06B at paras. 142-43.

48. *Ibid.*; Tribunal Exhibit AP-2010-039-12A at para. 84.

49. Tribunal Exhibit AP-2010-039-06B at para. 3.

50. *Transcript of Public Hearing*, 5 April 2011, at 141, 155-56; 165-68.

51. \_\_\_\_\_; Tribunal Exhibit AP-2010-039-12B (protected), tab G; *Transcript of Public Hearing*, 5 April 2011, at 139.



66. Furthermore, note 1(b) to Chapter 74 of the *Customs Tariff* provides the following definition of copper alloys:

Metallic substances other than unrefined copper in which copper predominates by weight over each of the other elements, provided that:

- (i) the content by weight of at least one of the other elements is greater than the limit specified in the foregoing table; or
- (ii) the total content by weight of such other elements exceeds 2.5%.

67. The table referred to in note 1(a) to Chapter 74 of the *Customs Tariff* provides as follows:

#### Chapter 74

#### COPPER AND ARTICLES THEREOF

**Note.**

1. In this Chapter the following expressions have the meanings hereby assigned to them:

(a) **Refined copper**

Metal containing at least 99.85% by weight of copper; or

Metal containing at least 97.5% by weight of copper, provided that the content by weight of any other element does not exceed the limit specified in the following table:

Table -- Other elements

Element	Limiting content % by weight
Ag Silver	0.25
As Arsenic	0.5
Cd Cadmium	1.3
Cr Chromium	1.4
Mg Magnesium	0.8
Pb Lead	1.5
S Sulphur	0.7
Sn Tin	0.8
Te Tellurium	0.8
Zn Zinc	1
Zr Zirconium	0.3
Other elements*, each	0.3

68. The Tribunal also notes that a definition of bronze is found in subheading note 1(b) to Chapter 74 of the *Customs Tariff*, which provides as follows:

1. In this Chapter the following expressions have the meanings hereby assigned to them:

...

(b) **Copper-tin base alloys (bronzes)**

Alloys of copper and tin, with or without other elements. When other elements are present, tin predominates by weight over each of such other elements, except that when the tin content is 3% or more the zinc content by weight may exceed that of tin but must be less than 10%.

69. Therefore, according to the *Customs Tariff*, a copper alloy is a substance in which copper is the predominant material but where the content by weight of at least one other element is greater than 0.25 percent to 1.5 percent (depending on the element), or the total content by weight of all other elements

exceeds 2.5 percent. The *Customs Tariff* also provides that bronze is an alloy of copper and tin with or without other elements. In order to be considered bronze, the tin content must predominate over each of the other elements (besides copper), with some exceptions where the other material is zinc. As such, the Tribunal finds that a product that meets the definition of bronze found in the *Customs Tariff* would also meet the definition of copper alloy contained in the same chapter of the *Customs Tariff*.

70. Moreover, the Tribunal notes that the subheading for bronze in the *Customs Tariff* is found at the second level under the first level for “copper alloys”.

71. On the basis of the foregoing, the Tribunal finds that, pursuant to the *Customs Tariff*, bronze is considered a copper alloy.

72. The Tribunal further notes that the CBSA submitted evidence regarding an industry standard for the composition of bronze found in the “1996 Annual Book of ASTM Standards, Section 2, Nonferrous Metal Products, volume 02.0, Copper and Copper Alloys”<sup>52</sup> (ASTM standards) which provides that brasses and bronzes are copper alloys. According to the ASTM standards, bronze is a copper alloy in which the major alloying element is not zinc or nickel. Originally, “bronze” described alloys with tin as the only or principal alloying element.<sup>53</sup> The CBSA also referenced the *Metals Handbook*<sup>®</sup>, which defines bronze as a copper-rich copper-tin alloy with or without small proportions of other elements, such as zinc and phosphorus.<sup>54</sup>

73. At the hearing, Mr. Bond acknowledged that “[b]ronze is a copper alloy, but it is a different copper alloy than brass”.<sup>55</sup>

74. On the basis of the above-noted evidence, the Tribunal is satisfied that bronze is a copper alloy. Therefore, the Tribunal is of the view that pipe fittings made of bronze are covered by the findings, provided they are listed in the appendix to the findings.

Are the Goods in Issue of the Same Description as the Subject Goods Listed in the Appendix to the Findings?

75. In the appendix, the Tribunal set out a list of goods subject to the findings. It stated the following regarding its inquiry:<sup>56</sup>

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, for use in heating, plumbing, air conditioning and refrigeration applications, restricted to the products enumerated in the appendix to these findings (copper pipe fittings), originating in or exported from the United States of America, the Republic of Korea and the People’s Republic of China . . . have caused injury or retardation or are threatening to cause injury to the domestic industry.

76. The list of subject goods includes 1,141 goods and two exclusions. The listed exclusions are not relevant to this appeal.

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52. Tribunal Exhibit AP-2010-039-12A, tab B.

53. *Ibid.*, tab B at 116.

54. *Ibid.*, tab C at 120.

55. *Transcript of Public Hearing*, 5 April 2011, at 129.

56. *Copper Pipe Fittings*; Tribunal Exhibit AP-2010-039-06C, tab 14 at 377.

77. As previously set out above, BMI has argued that the goods in issue are not subject to the findings on several grounds. These include confusion regarding the meanings of DWV and CD, ambiguities in the findings resulting from the use of the asterisk, the inapplicability of the findings to products comprised of multiple parts, and discrepancies between BMI product descriptions and product descriptions found in the appendix to the findings.

78. The Tribunal will address each of these issues in turn in the paragraphs that follow. In addition, the Tribunal will address the issue of recourse to the statement of reasons to the findings, in the case of ambiguity in the findings and the appendix to the findings.

#### Meanings of DWV and CD

79. At the hearing, BMI submitted that the abbreviation “DWV” does not have the same meaning as the abbreviations “CD” and “WD” contained in the appendix to the findings. It submitted that DWV has a broader meaning than drainage and encompasses fittings used for waste and venting, in addition to drainage. Consequently, BMI argued that some of the goods in issue<sup>57</sup> marked as DWV cannot be captured in the appendix to the findings by product descriptions that do not specifically include the abbreviation DWV.<sup>58</sup>

80. The Tribunal notes that the issue arising from this argument is whether CD and DWV are equivalent terms. In the abbreviation chart of the appendix to the findings, CD is defined as “cast drainage”. Similarly, WD is defined as “wrought drainage” and DWV is defined as “drainage, waste, vent”.<sup>59</sup> The Tribunal notes that the terminology “cast” and “wrought” refers to the manufacturing process of the products and not to their functional use. Therefore, the question is whether a product used for drainage is a DWV product.

81. The Tribunal notes that, in the appendix to the findings, which is divided into different product categories, under the product category entitled “Subject Copper Pipe Fittings - DWV TY’s”, the abbreviation “CD” is included in the product description of each of the products listed. The same is found under the title “Subject Copper Pipe Fittings – DWV Y’s”. The abbreviation “CD” is not listed in a heading as is DWV; instead, it is used in the product descriptions to indicate the use within a broader category of products.<sup>60</sup> In the Tribunal’s view, the product descriptions with the abbreviation “CD” are clearly part of a product category referred to in the header as “TY’s” and “Y’s” used for “drainage, waste, vent”.<sup>61</sup> When the abbreviation chart in the appendix to the findings and the headers (product category) in the appendix are read together, the Tribunal concludes that the product descriptions that contain the abbreviation “CD” in the appendix refer to products used for “drainage”, which falls in the product category of “drainage, waste and vent”.

82. During cross-examination, Mr. Bond stated the following: “. . . what I saw was that CD means cast drainage, and what I am selling is a cast DWV.”<sup>62</sup> BMI conceded, at the hearing, that one of its products, Exhibit B-11, may be covered in the appendix to the findings where the product is described as CD under the category “Subject Copper Pipe Fittings - DWV TY’s”.<sup>63</sup>

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57. Exhibits B-06, B-07, B-08, B-9, B-10 and B-11.

58. *Transcript of Public Hearing*, 5 April 2011, at 141-43.

59. Tribunal Exhibit AP-2010-039-06C, tab 14 at 379.

60. *Ibid.*, tab 14 at 393.

61. “TY” is described in the abbreviation chart of the appendix to the findings as a 90° drainage tee, while “Y” is a 45° drainage tee. Tribunal Exhibit AP-2010-039-06A (protected), tab 14 at 379.

62. Tribunal Exhibit AP-2010-039-27 (protected); Exhibit AP-2010-039-06C, tab 14 at 380, 381, 386; *Transcript of in Camera Hearing*, 5 April 2011, at 4. See note 7 concerning BMI items 10 and 11.

63. *Transcript of Public Hearing*, 5 April 5 2011, at 118; Tribunal Exhibit AP-2010-039-06C, tab 14 at 393. The Tribunal notes that BMI agreed to Exhibit B-11 being described in ASME B16.23-2002 shown in Tribunal Exhibit AP-2010-039-18A at 37; *Transcript of Public Hearing*, 5 April 5 2010, at 70.

83. On the basis of the foregoing, and for the purpose of determining whether the goods in issue are of the same description as the subject goods listed in the appendix of the findings, the Tribunal concludes that a product description that uses the abbreviation “DWV” for the usage is of the same description as a product description that uses the abbreviation “D” in the appendix to the findings.

84. In further support of this conclusion, the Tribunal notes the ASME standard submitted into evidence by BMI entitled “ASME B16.23-2002, Cast Copper Alloy Solder Joint *Drainage* Fittings: DWV” [emphasis added], which refers to drainage and DWV without apparent distinction between these two denominations.<sup>64</sup> The standard provides as follows:

## 2 DESCRIPTION

(a) These fittings are “designed for drainage and vent systems using the solder joint method of connection. . . .

. . .

## 6 MARKING

(a) Each fitting shall be marked permanently and legibly with the manufacturer’s name or trade mark and with DWV (to indicate Drain Waste Vent).

(b) Vent fittings shall be permanently marked “VENT ONLY” . . . and show the manufacturer’s name or trademark . . . .

85. The Tribunal notes that ASME B16.23 does not require two different markings, one for “D” and one for “DWV”; it only requires the marking “DWV”, which includes drainage. The Tribunal notes that, during panel examination on the question of whether another standard would exist to cover fittings for “drainage” only, Mr. Bouthillette indicated that he was not aware of any other existing standards for these products.<sup>65</sup>

86. The Tribunal further notes the different practices within the industry, relative to the abbreviations “DWV” and “CD” used in the part number of a given product, as exemplified by the marketing practices used by Cello<sup>66</sup> and BMI.<sup>67</sup> In the Tribunal’s view, these marketing practices merely reflect marketing choices and do not suggest, support or justify, in themselves, a different interpretation of the findings when these abbreviations are used. These two abbreviations, more precisely the “D” in “CD” and in “DWV”, represent goods of the same description with regard to usage.

### Meaning of the Asterisk

87. BMI argued that the use of the asterisk in the findings leads to confusion and ambiguity in the interpretation of the findings.

88. The appendix to the findings provides as follows:<sup>68</sup>

1. The tables to this appendix list, by product category, the copper pipe fittings that are covered by the Tribunal’s findings. Where an asterisk (\*) follows a specific copper pipe fitting description, it indicates that both wrought *and* cast copper pipe fittings are covered by the Tribunal’s findings.

[Emphasis added]

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64. Tribunal Exhibit AP-2010-039-18A at 22.

65. *Transcript of Public Hearing*, 5 April 2011, at 129.

66. Tribunal Exhibit AP-2010-039-12A, tab O at 264-66.

67. *Transcript of Public Hearing*, 5 April 2011, at 49.

68. Tribunal Exhibit AP-2010-039-06C, tab 14 at 379.

89. The Tribunal notes that Mr. Bond, under cross-examination, agreed that the asterisk indicates that both wrought and cast copper pipe fittings are covered by the findings.<sup>69</sup>

90. The Tribunal concludes that the findings clearly indicate that the asterisk denotes the inclusion of both cast and wrought manufacturing processes when mentioned with a given product description.

#### Multiple Parts

91. BMI submitted that certain goods in issue consisted of multiple parts, such as the waste connectors.<sup>70</sup> It argued that, since these individual parts were not listed in the appendix to the findings, the assembled goods could not be subject to the findings.<sup>71</sup>

92. BMI asked Mr. Bond if the following manufacturing process for cast fittings described in the statement of reasons under the header “Production Process” was accurate: “A sand core for each fitting is made using an aluminum or steel core box.”<sup>72</sup> Mr. Bond noted that goods consisting of multiple parts would require at least two moulds.<sup>73</sup>

93. When asked by the CBSA if the parts that compose a multiple-part item are imported individually, Mr. Bond confirmed that multiple parts are imported as one piece.<sup>74</sup> Consequently, the CBSA argued that, if three items are combined into a single item that is listed in the appendix to the findings, these multiple-part items should be considered subject goods.<sup>75</sup>

94. On examination by BMI, Mr. Bouthillette identified the product listed in table 49 of the “ASME B16.23-2002, Cast Copper Alloy Solder Joint Drainage Fittings: DWV”, “slip joint end”, as being a product made of three parts.<sup>76</sup>

95. The Tribunal finds that the goods in issue, composed of multiple parts that are listed in the appendix to the findings, even if each of the composite parts is not individually listed, would be subject to the findings.

96. Furthermore, as discussed below, the Tribunal finds that it is not necessary to consider the statement of reasons to determine whether the goods in issue are subject goods. However, even if the Tribunal did consider it appropriate to refer to the statement of reasons, it notes that the reference to “a mould” is included under the header “Production Process”, which outlines the methods and procedures for manufacturing copper pipe fittings in general terms and does not outline the process for each specific item included in the appendix to the findings.

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69. *Transcript of Public Hearing*, 5 April 2011, at 103.

70. Exhibit B-08, or BMI product No. 28647, and Exhibit B-09, or BMI product No. 28646; *Transcript of Public Hearing*, 5 April 2011, at 50-52.

71. *Transcript of Public Hearing*, 5 April 2011, at 140-41.

72. *Copper Pipe Fittings* at para. 25.

73. *Transcript of Public Hearing*, 5 April 2011, at 51-52.

74. *Ibid.* at 114.

75. *Ibid.* at 215.

76. *Ibid.* at 59-60; Tribunal Exhibit AP-2010-039-18A at 28, 54.

Product Descriptions

97. BMI argued that the product descriptions of some of the goods in issue<sup>77</sup> do not match the product descriptions contained in the appendix to the findings. BMI further argued that the Tribunal should not accept the CBSA's classification of the goods without specific evidence that the goods in issue are of the same description as the products in the appendix to the findings.<sup>78</sup>

98. The CBSA argued that it would be untenable for the Tribunal to include product descriptions specific to each manufacturer of pipe fittings in its findings. According to the CBSA, the issue is not whether the product descriptions match the descriptions assigned by BMI, but rather whether the goods in issue are in fact the same products as the items listed in the appendix to the findings.<sup>79</sup>

99. The Tribunal accepts the CBSA's contention that the product descriptions of various manufacturers will not always be identical in terms of language to the product descriptions listed in the appendix to the findings. In this regard, the Tribunal agrees that variations in descriptors should not have the effect of removing these goods from the findings if they are of the same description as the subject goods.

100. As it is the Tribunal's responsibility, under subsection 51(3) of *SIMA* to determine the subjectivity of goods, the Tribunal must, in an appeal, consider each product description on a case-by-case basis.

Is There an Ambiguity in the Wording of the Findings?

101. As noted above, BMI argued that the findings contained several ambiguities and that the Tribunal should consider the statement of reasons to the findings and other related documents in determining whether the goods in issue are subject goods.

102. The Tribunal has disposed of the issues raised by BMI relative to the meaning of the asterisk and the meaning of "DWV" and "CD" in the context of the findings. Therefore, the Tribunal finds that there is no patent ambiguity in the wording of the findings in regard to these two arguments raised by BMI. The Tribunal is of the view that it is not necessary and, therefore, would be inappropriate to have recourse to the statement of reasons for the reasons explained below.

103. Pursuant to subsection 43(1) of *SIMA* and the duty liability provisions in Part I, the goods that are subject to anti-dumping duties are those goods in respect of which the Tribunal has made an order or finding under *SIMA*.

104. Duty enforcement is a discrete phase of Canada's anti-dumping system, which is separate and distinct from the phases of initiation, preliminary determination, final determination, and review of orders or findings.

105. In this regard, a Tribunal order or finding is to be interpreted and enforced strictly on the basis of the words therein contained; it is inappropriate to look behind the order or finding unless there is ambiguity or confusion in its wording. In such extraordinary situations, it is the Tribunal's view that recourse can only be had to the statement of reasons that accompanied the Tribunal's order or finding.

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77. Exhibits B-06, B-07, B-08 and B-09.

78. *Transcript of Public Hearing*, 5 April 2011, at 170.

79. *Ibid.* at 212; Tribunal Exhibit AP-2010-039-12A at para. 51.

106. The Federal Court of Appeal, in *Trane*, determined the following:

. . . there is not in my opinion a clearly established principle that the reasons for decision may not be referred to in order to clarify the terms of a formal decision the precise application of which is not, as a matter of fact, clear on its face. . . . In these circumstances it is permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal.<sup>80</sup>

107. Under the scheme of *SIMA*, and in particular subsection 43(1), it is the Tribunal which is responsible for declaring to what goods its order or finding applies. Accordingly, it is the Tribunal's view that, in seeking to remove a patent ambiguity or confusion from a Tribunal order or finding, it would be inappropriate to have recourse to information that does not form part of the Tribunal's own reasons.

108. In this case, the Tribunal has found that the findings are clear and unambiguous and that the extraordinary recourse to the statement of reasons is not required.

#### Comparison Between the Goods in Issue and the Subject Goods

109. On the basis of the foregoing analysis, i.e. the asterisk indicates that both wrought and cast pipe fittings are covered by the findings, "CD" indicates "cast drainage" and "DWV" indicates "Drainage, Waste Vent", with respect to the description of the subject goods listed in the appendix to the findings, the Tribunal determines that Exhibits B-01 to B-05, described as unions, are of the same description as the following subject goods:<sup>81</sup>

BMI Item No.	BMI Product No.	Exhibit No.	Subject Goods in the Appendix to the Findings
1	21105	B-01	-----
2	21106	B-02	-----
3	-----	B-03	-----
4	-----	B-04	-----
5	-----	B-05	-----

110. The Tribunal determines that Exhibits B-07 and B-08, described as adapters for drainage, and Exhibit B-11 described as an elbow for drainage, are subject to the findings, as they meet the description in the appendix to the findings. The Tribunal also notes that item 6 is marked with the country of origin, China, a company trademark, a part size and the acronym "DWV", and BMI item No. 7 is marked with the country of origin, China, a company trademark and a part size. BMI item No. 10 is marked with the part size, the country of origin, China, the company trademark and "DWV", in accordance to the ASME standard. These adapters are listed in the appendix to the findings under "Female Adapters", "Male Adapters" and "Elbows":

BMI Item No.	BMI Product No.	Exhibit No.	Subject Goods in the Appendix to the Findings
6	-----	B-07	-----
7	-----	B-08	-----
10	-----	B-11 <sup>82</sup>	-----

80. *Trane* at 206; Tribunal Exhibit AP-2010-039-06C, tab 23 at 539.

81. Tribunal Exhibit AP-2010-39-27A (protected); Tribunal Exhibit AP-2010-039-06C, tab 14 at 391.

82. Tribunal Exhibit AP-2010-039-23 (protected). Items 10 and 11 are inverted on the list of exhibits.

111. The Tribunal determines that Exhibits B-06 and B-09, described as waste connectors, are subject to the findings, as they meet the description of “other adapters”:<sup>83</sup>

BMI Item No.	BMI Product No.	Exhibit No.	Subject Goods in the Appendix to the Findings
8	-----	B-06	-----
9	-----	B-09	-----

112. The Tribunal notes that BMI described these above two products as “waste connectors” in its 2009 price list.<sup>84</sup> Furthermore, during the hearing, BMI submitted that Exhibits B-06 and B-09, “waste connectors”, met the manufacturing description of cast fittings found in paragraph 26 of the statement of reasons to the findings, but that they did not meet the description in paragraph 25.<sup>85</sup> The Tribunal concludes that the wording in the findings is not ambiguous and that the “Other Adapters” product category listed in the appendix to the findings includes trap adapters, i.e. waste connectors as referred to by BMI. As previously noted, BMI identified the product listed in table 49 of the “ASME B16.23-2002, Cast Copper Alloy Solder Joint Drainage Fittings: DWV” as a “slip joint end”.<sup>86</sup>

113. The Tribunal determines that Exhibit B-10 is also covered by the findings. It was conceded by Mr. Bond during the hearing that the header “Subject Copper Pipe Fittings – DWV TY’s” in the appendix to the findings specifically provided for DWV products using CD as a descriptive for the products listed below.<sup>87</sup>

BMI Item No.	BMI Product No.	Exhibit No.	Appendix- NQ-2006-002 - Subject Goods
11	-----	B-10	-----

114. Consequently, the Tribunal finds that the goods in issue are of the same description as the subject goods and are therefore subject to anti-dumping duties.

#### Recommendation to the Minister of Finance Regarding Duty Remission Order

115. BMI submitted that, under paragraph 16(c) of the *CITT Act*, the Tribunal’s duties and functions are to “hear, determine and deal with appeals . . . and all matters related thereto . . .” BMI further submitted that, if the Tribunal finds that the goods in issue are covered by the findings, it should recommend to the Minister of Finance that a remission order be sought pursuant to section 115 of the *Customs Tariff*.<sup>88</sup>

116. In support of its position, BMI referred to three decisions of the Tax Court of Canada, in which the court included in *obiter* a recommendation to the Minister of Finance that a remission order be granted in instances where it felt that the outcome of its decision bound by legality was unjust.

83. Tribunal Exhibit AP-2010-39-27 (protected); Exhibit AP-2010-06C, tab 14 at 382.

84. Tribunal Exhibit AP-2010-039-12A, tab F at 127.

85. *Transcript of Public Hearing*, 5 April 2011, at 50; Tribunal Exhibit AP-2010-039-06C, tab C at 402.

86. *Transcript of Public Hearing*, 5 April 2011, at 59-60; Tribunal Exhibit AP-2010-039-18A, tab 10 at 28, 54.

87. *Transcript of Public Hearing*, 5 April 2010, at 117-18.

88. *Ibid.* at 182.



117. The Tribunal notes that there is nothing in the *CITT Act* that provides the authority to make such an order or formal recommendation.

118. Section 16 of the *CITT Act* provides the Tribunal with powers to “hear, determine and deal with” appeals and “all matters related thereto”. The Tribunal has interpreted the phrase “all matters related thereto” as being confined to matters directly arising from the exercise of its statutory jurisdiction. The Tribunal cannot use section 16 of the *CITT Act* to expand its jurisdiction, which is limited by statute.

119. Discretion in respect of duty remission orders was statutorily vested by Parliament in the ministers designated under section 115 of the *Customs Tariff*. While it is not for the Tribunal to recommend how this discretion should be exercised, there is nothing precluding a party from making direct application for the remission of anti-dumping or countervailing duties to the Minister of Finance, as minister responsible for *SIMA*.

#### Waiver of GST and Interest on the GST

120. BMI submitted that the CBSA does not have the authority to charge interest on the GST payable by BMI, as it was entitled to claim a full input tax credit pursuant to subsection 169(1) of the *Excise Tax Act*<sup>89</sup> and, therefore, the Government was not deprived of funds.<sup>90</sup> BMI requested that, in the event that the Tribunal finds that the goods in issue are subject goods, an order to waive the interest be made.<sup>91</sup>

121. BMI submitted that charging interest on GST is not recoverable and, in this case, is punitive. BMI noted that it exercised due diligence by describing the characteristics of the imported goods, by submitting samples of the goods in issue to the CBSA for analysis and, upon receiving the results of the CBSA’s analysis, by changing suppliers for non-source countries or, if not possible, by discontinuing the purchase of the products.<sup>92</sup>

122. BMI further submitted that the CBSA has the discretion to waive interest pursuant to subsection 3.3(1) of the *Customs Act*, section 126 of the *Customs Tariff* and section 281.1 of the *Excise Tax Act* and that the Tribunal has the jurisdiction, pursuant to section 17 of the *CITT Act*, to order the CBSA to waive the interest charged to BMI.<sup>93</sup>

123. The CBSA noted that interest is computed and compounded daily on outstanding amounts under the provisions of *SIMA* in accordance to Part I, section 3.1 of the *Customs Act*<sup>94</sup> and that subsection 33.4(1) of the *Customs Act* states expressly that interest is payable from the first day after the person becomes liable for the amount and ends on the day the amount has been paid in full.

124. The CBSA added that, in accordance with section 214 of the *Excise Tax Act*, interest and penalties “. . . shall be imposed, calculated, paid and collected . . . as if the tax were a customs duty levied on the goods under the *Customs Tariff*. . .” Incidentally, the term “duty” defined in subsection 2(1) of the *Customs Tariff* includes anti-dumping duties.

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89. R.S.C. 1985, c. E-15.

90. Tribunal Exhibit AP-2010-039-06B at 40.

91. *Transcript of Public Hearing*, 5 April 2011, at 182.

92. *Ibid.* at 112-13.

93. Tribunal Exhibit AP-2010-039-06B at 40.

94. R.S.C. 1985 (2d Supp.), c. 1.

125. The CBSA also noted that there is no provision in *SIMA* which permits a waiver or cancellation of interest or penalties. However, subsection 2(10) of *SIMA* extends the provisions of the *Customs Act* to anti-dumping duties, thus providing the CBSA with the discretion to waive or cancel all or a portion of any penalty or interest. The CBSA concluded that discretion was not exercised in this case.

126. Section 3.3 of the *Customs Act* provides the Minister of Finance, or any officer designated by the CBSA, with the discretion to waive or cancel all or any portion of any penalty or interest otherwise payable by a person under the *Customs Act*, which may include GST and interest payable on that GST.

127. Section 3.3 of the *Customs Act* is not subject to the re-determination provisions under the *Customs Act*, nor is it subject to appeal to the Tribunal. Therefore, the Tribunal does not have the jurisdiction to order the CBSA to waive interest in this case.

128. With respect to the Tribunal's jurisdiction on appeals under section 61 of *SIMA*, subsection 61(1) clearly provides that a person who deems himself aggrieved by a re-determination of the CBSA made pursuant to section 59 with respect to any goods may appeal to the Tribunal. Under section 59, the CBSA may re-determine any determination or re-determination made pursuant to sections 55 to 57. These decisions relate to the subjectivity, normal value or export price of imported goods. There is no reference in these sections to determinations or re-determinations with respect to GST or interest. Therefore, the relief requested by BMI is not within the Tribunal's jurisdiction pursuant to subsection 61(1).

129. The Tribunal came to the same conclusion in *EMI Music Canada v. President of the Canada Border Services Agency*,<sup>95</sup> a case relating to the *Customs Act*, where the appellant was seeking statutory entitlement to the amount of interest in respect of the refund of duties. EMI Music Canada had submitted that the Tribunal could determine its own jurisdiction in regard to administrative law. The Tribunal was of the view that it had an obligation to ascertain the nature of its jurisdiction from its legislation, which differs from applying its own jurisdiction. In its order, the Tribunal stated the following:

While an administrative Tribunal may, in some instances, derive powers by implication from an explicit power, the Tribunal is of the view that authority to hear appeals concerning origin, tariff classification, value for duty or marking determination of imported goods under section 67 of the [*Customs*] Act does not imply a power to hear an appeal concerning the amount owing in interest in respect of a refund of duties. As noted above, such a payment of interest is made pursuant to a specific section of the [*Customs*] Act that is not subject to appeal to the Tribunal.<sup>96</sup>

[Footnotes omitted]

130. In *Amersham Health Inc. (formerly Nycomed Amersham Canada Inc.) v. Commissioner of the Canada Customs and Revenue Agency*,<sup>97</sup> the Tribunal found that the remission of the anti-dumping duties was not made pursuant to subsection 60(1) of the *Customs Act* but was made pursuant to section 115 of the *Customs Tariff*, as a follow-up from the Minister of Finance who took into consideration the Tribunal's statement of facts and reasons which reflected its statutory opinion. Consequently, the Minister of Finance made a recommendation for discretionary relief to the Governor in Council under section 115 of the *Customs Act*, a section that does not have provisions for the refund of interest on duties.

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95. (22 June 2004), AP-2003-051 (CITT) [*EMI*].

96. *EMI* at para. 20.

97. (10 March 2003), AP-2001-093 (CITT).

131. BMI submitted that superior courts of record may order remedies in the nature of equitable relief on the basis of fairness. BMI further argued that the Tribunal has been vested with powers of a superior court of record under section 17 of the *CITT Act* and could order that interest be waived.<sup>98</sup>

132. In this regard, section 17 of the *CITT Act* provides as follows:

**17.** (1) The Tribunal is a court of record and shall have an official seal, which shall be judicially noticed.

**17.** (1) Le Tribunal est une cour d'archives; il a un sceau officiel dont l'authenticité est admise d'office.

(2) The Tribunal has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses ordonnances, ainsi que pour toutes autres questions liées à l'exercice de sa compétence, les attributions d'une cour supérieure d'archives.

133. Accordingly, the powers, rights and privileges vested in the Tribunal are statutorily limited by the phrase "... as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction . . . ." That being the case, the Tribunal is of the view that it is not empowered to grant the requested remedy.

## DECISION

134. The appeal is dismissed.

Diane Vincent  
Diane Vincent  
Presiding Member

Pasquale Michael Saroli  
Pasquale Michael Saroli  
Member

Stephen A. Leach  
Stephen A. Leach  
Member

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98. Tribunal Exhibit AP-2010-039-06B at paras. 138-39.