



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2010-063

Toyota Tsusho America, Inc.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Friday, November 18, 2011*

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IN THE MATTER OF an appeal heard on September 13 and 14, 2011, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated December 13, 2010, with respect to requests for re-determination pursuant to section 59 of the *Special Import Measures Act*.

**BETWEEN**

**TOYOTA TSUSHO AMERICA, INC.**

**Appellant**

**AND**

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

**Respondent**

**DECISION**

The appeal is dismissed.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Serge Fréchette  
Serge Fréchette  
Member

Stephen A. Leach  
Stephen A. Leach  
Member

Dominique Laporte  
Dominique Laporte  
Secretary

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: September 13 and 14, 2011

Tribunal Members: Jason W. Downey, Presiding Member  
Serge Fréchette, Member  
Stephen A. Leach, Member

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**Respondent**

President of the Canada Border Services Agency

**Counsel/Representative**

Alexandre Kaufman

**WITNESSES:**

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Gottlieb and Associates

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Department of Materials Science and Engineering  
Faculty of Applied Science and Engineering  
University of Toronto

Dr. Laurie E. Collins  
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## STATEMENT OF REASONS

### BACKGROUND

1. This is an appeal filed by Toyota Tsusho America, Inc. (Toyota Tsusho) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 61(1) of the *Special Import Measures Act*<sup>1</sup> from decisions made by the President of the Canada Border Services Agency (CBSA) pursuant to section 59.

2. In the present appeal, the Tribunal must determine whether certain steel plates, which were imported into Canada by Toyota Tsusho and upon which anti-dumping duties were levied (the goods in issue), are of the same description as the goods to which the Tribunal's order in Expiry Review No. RR-2007-001<sup>2</sup> (the Order) applies.<sup>3</sup> The Order continued a Tribunal order in Expiry Review No. RR-2001-006,<sup>4</sup> which continued, with amendment, a Tribunal finding in Inquiry No. NQ-97-001<sup>5</sup> (the Finding).

3. Specifically, the issue in this appeal is whether the goods in issue constitute "carbon steel".

### TRIBUNAL'S ORDER AND FINDING

4. The Order reads, in relevant part, as follows:

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its order in respect of hot-rolled *carbon steel* plate originating in or exported from the People's Republic of China [China].

[Emphasis added]

5. The Finding reads, in relevant part, as follows:

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue of a preliminary determination of dumping dated June 27, 1997, and of a final determination of dumping dated September 25, 1997, respecting the importation into Canada of hot-rolled **carbon steel** plate and high strength low alloy plate not further manufactured than hot-rolled, heat-treated or not, in cut lengths, in widths from 24 inches (+/- 610 mm) to 152 inches (+/- 3,860 mm) inclusive, and thicknesses from 0.187 inches (+/- 4.75 mm) to 4 inches (+/- 101.6 mm) inclusive, originating in or exported from Mexico, . . . China, the Republic of South Africa and the Russian Federation, but excluding plate for use in the manufacture of pipe and tube (also known as skelp); plate in coil form; plate having a rolled, raised figure at regular intervals on the surface (also known as floor plate); and plate produced to ASTM specifications A515 and A516M/A516, grade 70, in thicknesses greater than 3.125 inches (+/- 79.3 mm).

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

2. *Hot-rolled Carbon Steel Plate* (9 January 2008) (CITT).

3. The CBSA's decisions stem from a determination, pursuant to paragraph 56(1)(a) of *SIMA*, that the imported goods were goods of the same description as the goods to which the Order applies. In accordance with subsection 61(3), on an appeal pursuant to subsection 61(1), the Tribunal may ". . . make such order or finding as the nature of the matter may require and . . . may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken . . ."

4. *Certain Hot-rolled Carbon Steel Plate* (10 January 2003) (CITT).

5. *Certain Hot-rolled Carbon Steel Plate* (27 October 1997) (CITT).

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods has not caused material injury to the domestic industry, but is threatening to cause material injury to the domestic industry.

[Bold added for emphasis]

## GOODS IN ISSUE

6. It is an agreed fact that the goods in issue are hot-rolled steel plate, not further manufactured than hot-rolled, heat-treated or not, in cut lengths from 6,096 mm (240 inches) to 12,192 mm (480 inches), in widths from 2,300 mm (96 inches) to 3,050 mm (120 inches), and thicknesses from 1/2 inch (13 mm) to 2 1/4 inches (58 mm).<sup>6</sup>

7. The goods in issue are described on the mill test certificates as being ASTM<sup>7</sup> steel grade A-36B and as meeting the ASTM A36/A36M-05 standard specification for carbon structural steel. They are produced by Tianjin Iron and Steel Company Ltd., Tianjin, China.<sup>8</sup>

8. The goods in issue consist, as a percentage by weight, of the following elements: 0.15 to 0.20 of carbon, 0.19 to 0.34 of silicon, 0.64 to 1.00 of manganese, 0.006 to 0.029 of phosphorus, 0.005 to 0.021 of sulphur, 0.009 to 0.073 of aluminum/alumina and 0.001 to 0.003 of boron.<sup>9</sup>

## PROCEDURAL HISTORY

9. The Order was issued on January 9, 2008, and remains in force for five years.

10. In September 2008, Toyota Tsusho directed its counsel, Mr. Shane Brown, to contact the CBSA to inquire into whether steel plate containing boron, originating in China, would be subject to anti-dumping duties pursuant to the Order.<sup>10</sup> Toyota Tsusho alleged that, on September 25, 2008, an official of the CBSA, Mr. Darryl Larson, advised Mr. Brown that steel plate containing boron, originating in China, would not be subject to anti-dumping duties.<sup>11</sup>

11. Between November 20, 2008, and February 24, 2009, Toyota Tsusho reported importations of the goods in issue under nine transactions.<sup>12</sup> Toyota Tsusho declared these importations under tariff item No. 7225.40.99 of the schedule to the *Customs Tariff*<sup>13</sup> as “other alloy steel”.

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6. The goods are not plate for use in the manufacture of pipe and tube (also known as skelp); plate in coil form; plate having a rolled, raised figure at regular intervals on the surface (also known as floor plate); or plate produced to ASTM specifications A515 and A516M/A516, grade 70, in thicknesses greater than 3.125 inches (+/- 79.3 mm). Tribunal Exhibit AP-2010-063-09C, tab B; Tribunal Exhibit AP-2010-063-12B, tab 9; *Transcript of Public Hearing*, 13 September 2011, at 5.

7. Tribunal Exhibit AP-2010-063-21B at 5.

8. Tribunal Exhibit AP-2010-063-09C, tabs B, E at para. 18.

9. Tribunal Exhibit AP-2010-063-09A at para. 15; Tribunal Exhibit AP-2010-063-09C, tab B.

10. Tribunal Exhibit AP-2010-063-09C, tab E.

11. *Ibid.*, tabs E, D.

12. Tribunal Exhibit AP-2010-063-09A at para. 11.

13. S.C. 1997, c. 36.

12. On July 28, 2009, however, the CBSA informed Toyota Tsusho in writing that the goods in issue were subject to anti-dumping duties. Toyota Tsusho reacted by filing an application for judicial review on August 26, 2009, which the Federal Court later dismissed for lack of jurisdiction.<sup>14</sup> An appeal of the Federal Court's decision was also dismissed.<sup>15</sup>

13. Meanwhile, the CBSA affirmed its determination between November 9, 2009, and April 21, 2010, through re-determinations made pursuant to section 57 of *SIMA*.<sup>16</sup> The CBSA reasoned that the goods in issue were carbon steel plate and, therefore, of the same description as the goods to which the Order applies.

14. On December 13, 2010, the CBSA issued further re-determinations pursuant to section 59 of *SIMA*, maintaining that the goods in issue were subject to anti-dumping duties.<sup>17</sup>

15. On February 22, 2011, Toyota Tsusho filed the present appeal.<sup>18</sup>

16. On March 7, 2011, Toyota Tsusho filed a request pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*<sup>19</sup> for the issuance of subpoenas, for the production of documents and for the resolution of issues concerning the Tribunal's jurisdiction.

17. On April 27, 2011, having considered Toyota Tsusho's request and written representations of the parties, the Tribunal issued an order reserving judgment on the request for the production of documents and the issuance of subpoenas pending the filing of the CBSA's brief and ruled that it did not have the authority either to consider issues of natural justice and procedural fairness relating to the manner in which the CBSA's decisions were reached or to grant an injunction to prevent the CBSA from assessing duties.

18. On August 8, 2011, after the CBSA filed its brief, Toyota Tsusho renewed its request for the issuance of subpoenas and the production of documents. On August 30, 2011, the Tribunal dismissed the request for the production of documents, but granted the request for the issuance of subpoenas with the caveat that any evidence on the manner in which the CBSA's decisions were reached would be inadmissible. Toyota Tsusho subsequently served subpoenas on Mr. Larson, Ms. Caterina Ardito-Toffolo, Mr. Paul Loo, Ms. Micheline Vanier and Ms. Francine Bouchard, all employees of the CBSA. It later withdrew subpoenas for Mr. Loo and Ms. Bouchard and, at the hearing, chose not to call upon Ms. Ardito-Toffolo. As well, Toyota Tsusho filed a non-confidential version of the documents that it had unsuccessfully sought.

19. On September 9, 2011, pursuant to subrule 18(1) of the *Rules*, the Tribunal held a pre-hearing teleconference with counsel for the parties. The Tribunal used this teleconference, *inter alia*, to identify points upon which the parties agreed and to remind counsel that evidence on the manner in which the CBSA had reached its decisions would not be admissible.

20. On September 13 and 14, 2011, the Tribunal heard the appeal.

21. At the hearing, Toyota Tsusho called four witnesses: Mr. Larson, Ms. Vanier, Mr. Brown and Dr. Doug D. Perovic. The CBSA called Dr. Laurie E. Collins.

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14. *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*, 2010 FC 78 (CanLII).

15. *Toyota Tsusho America Inc. v. Canada (Border Services Agency)*, 2010] FCA 262 (CanLII).

16. Tribunal Exhibit AP-2010-063-24B at 758-63, 955-65.

17. Tribunal Exhibit AP-2010-063-01A.

18. *Ibid.*

19. S.O.R./91-499 [*Rules*].



22. Mr. Larson briefly testified with respect to some procedural history. Therefore, his testimony did not, in any way, help the Tribunal to determine whether the goods in issue are carbon steel plate.

23. Ms. Vanier's testimony was very brief, touching upon a customs analysis report that she had written for the CBSA. In cross-examination, counsel for the CBSA had only a few questions relating to her experience. The Tribunal had no questions for Ms. Vanier. Her lay opinion on what constitutes the ordinary meaning of carbon and alloy steel carries little weight; therefore, her testimony was not very helpful in resolving this appeal.

24. Mr. Brown also testified, mostly concerning a handwritten message from a telephone conversation that he had with his client, Toyota Tsusho, in 2008. According to the CBSA, this note purported to constitute an admission that boron was a needless or useless additive. Toyota Tsusho tried to establish that these were merely Mr. Brown's own inexpert words. As Toyota Tsusho's motives are not relevant to the resolution of this appeal, Mr. Brown's testimony was also not helpful.

25. As this appeal turns on the composition of the goods in issue, the expert testimonies of Dr. Perovic and Dr. Collins were most helpful.

26. Dr. Perovic, a professor in the Faculty of Applied Science and Engineering at the University of Toronto, has a PhD in materials science and 20 years' experience in teaching courses that deal with metallurgy and metallurgical engineering, including relating to steel. In addition, he has received a number of research grants and produced publications that relate directly to steel. On the basis of this training and experience, the Tribunal recognized Dr. Perovic as an expert in materials science and metallurgical engineering.

27. Dr. Collins has a PhD in metallurgy from the Massachusetts Institute of Technology and worked in the Canadian steel industry for many years, including as a research scientist in the field of steel metallurgy. Toyota Tsusho objected, in part, to his qualification as an expert because most of his recent work experience was in management. However, he kept up his qualifications by attending conferences, writing papers, supervising and funding university programs, and staying affiliated with the American Society of Metals and the Canadian Institute of Mining, Metallurgy and Petroleum.

28. On the basis of this training and experience, the Tribunal recognized Dr. Collins as an expert in steel metallurgy. However, as Toyota Tsusho pointed out, Dr. Collins was not an independent expert, as his employer, Evraz Inc. NA, was one of the Canadian steel plate producers protected by the Order. The Tribunal took this fact into account when weighing his evidence.

29. Toyota Tsusho argued that Dr. Collins' lack of independence ought to have precluded him from providing opinion evidence, citing the example of Mr. Phil Weedon, a witness whose opinions the Tribunal refused to allow into evidence in File Nos. PR-2010-049, PR-2010-050 and PR-2010-058<sup>20</sup> However, that very exceptional case was easily distinguishable. Mr. Weedon had drafted and filed the complaint himself, had represented the complainant as counsel at an earlier phase of the proceedings and previously, in many related proceedings, had attempted to obtain leave to intervene in right of his own company and personally stood to profit from the outcome of the case. Instead, Dr. Collins' situation was akin to that of Mr. Marcel Lemieux in the above-noted case; Mr. Lemieux was an expert in the employment of the respondent whose opinions were allowed, but given reduced weight because of his relationship with one of the parties.

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20. *Re Complaint Filed by Siemens Enterprise Communications Inc., Formerly Enterasys Networks of Canada Ltd.* (23 December 2010) (CIIT).

## ANALYSIS

30. Toyota Tsusho takes the position that the goods in issue are alloy steel, not carbon steel, and are therefore not of the same description as the goods to which the Order applies.

31. The CBSA's position is that the goods in issue are carbon steel and therefore subject to anti-dumping duties pursuant to the Order.

32. The parties agree that the Order does not apply to alloy steel; it unambiguously applies to "carbon steel plate" only. Therefore, the sole issue is whether the goods in issue constitute alloy steel, as claimed by Toyota Tsusho, or carbon steel, as determined by the CBSA. In particular, does the minute quantity of boron in the goods in issue make them alloy steel instead of carbon steel?

33. Toyota Tsusho's case relies, in large measure, on the fact that the goods in issue are classified in heading No. 72.25 as "[f]lat-rolled products of other alloy steel" because of the 0.001-0.003 percent boron content of the goods in issue. Note 1(f) to Chapter 72 defines the phrase "other alloy steel" as "[s]teels not complying with the definition of stainless steel and containing by weight one or more of the following elements in the proportion shown: . . . 0.0008% or more of boron . . ." Likewise, the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>21</sup> to Sub-Chapter IV of Chapter 72 refer to "[a]lloy steels having improved tensile strength and welding properties containing in particular very small quantities of boron (0.0008% or more by weight) . . ."

34. Tariff classification, however, is not determinative for purposes of this appeal under *SIMA*. Whereas in tariff classification cases, one must look to the terms of the schedule to the *Customs Tariff* and the *Explanatory Notes*, in this case, the Tribunal must look at the terms of the Order. It is the description of the goods in the Order that is determinative of whether imported goods should be subject to anti-dumping or countervailing duties.<sup>22</sup>

35. The Tribunal was also presented with the steel classification schemes of the American Iron and Steel Institute (AISI) and the Society for Automotive Engineers (SAE), and the steel specifications of ASTM International.

36. Dr. Perovic explained that, whereas the AISI/SAE classification system uses grade designations based on composition, the ASTM specifications refer to product requirements, which may include both composition and mechanical properties.<sup>23</sup> Dr. Perovic testified that the AISI/SAE and ASTM standards are equally valid, but that, in his view, the ASTM standard is more specific.<sup>24</sup>

37. Toyota Tsusho argued that the ASTM A941-10a standard terminology definitions of carbon steel and alloy steel confirm that the goods in issue are indeed alloy steel. The definitions read as follows:

*Carbon Steel- a steel that conforms to a specification that prescribes a maximum limit, by heat analysis in mass percent, of not more than: 2.00 for carbon and 1.65 for manganese, but does not prescribe a minimum limit for limit for chromium, cobalt, molybdenum, nickel, niobium [columbium], tungsten [wolfram], vanadium or zirconium.*

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21. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

22. *APR Imports Ltd. v. Deputy M.N.R.C.E.* (28 February 1994), AP-93-141 (CITT); *Flortech Systems v. Deputy M.N.R.* (17 October 1996), AP-95-093 (CITT).

23. *Transcript of Public Hearing*, 13 September 2011, at 79-81.

24. *Ibid.* at 78-82.

*Except as required above, it is permissible for carbon steel specifications to prescribe limits (minimum, maximum, or both) for each specified alloying element, subject to the following restrictions for the heat analysis limits in mass percent:*

...

(f) *for carbon steels that are required to contain boron . . . the specified minimum limit is not to exceed: 0.0005 for boron . . . .*

*Alloy Steel- a steel, other than a stainless steel, that conforms to a specification that requires one or more of the following elements, by mass percent, to have a **minimum** content, equal to or greater than: 0.30 for aluminum; **0.0008 for boron**; 0.30 for chromium; 0.30 for cobalt; 0.40 for copper; 0.40 for lead; 1.65 for manganese; 0.08 for molybdenum; 0.30 for nickel; 0.06 for niobium [columbium]; 0.60 for silicon; 0.05 for titanium; 0.30 for tungsten [wolfram]; 0.10 for vanadium; 0.05 for zirconium; or 0.10 for any other alloying element, except sulphur, phosphorus, carbon and nitrogen.<sup>25</sup>*

[Bold added for emphasis]

38. Dr. Perovic testified in examination-in-chief and in redirect that these definitions mean that steel with at least 0.0005 percent boron cannot be considered carbon steel.<sup>26</sup> Also, according to his testimony, the 0.0005 percent and 0.0008 percent range is a “grey area” in which the steel is undefined and, then, at 0.0008 percent, steel “graduates to an alloy steel”.<sup>27</sup> If true, according to both the schedule of the *Customs Tariff* and the ASTM definitions, the goods in issue are indeed not carbon steel, but alloy steel because of their 0.001-0.003 percent boron content.

39. However, the Tribunal is not persuaded that Dr. Perovic’s interpretation of the ASTM definitions is correct. His testimony in respect of these definitions was uneven. When cross-examined, he agreed with the suggestion that the carbon steel definition means only a specified minimum limit for boron, which cannot exceed 0.0005 percent in carbon steel, with no maximum limit.<sup>28</sup>

40. This latter interpretation is consistent with Dr. Collins’ evidence. He testified that the ASTM definition of carbon steel allows for a minimum boron content of up to 0.0005 percent and prescribes no maximum amount.<sup>29</sup>

41. The Tribunal agrees with this alternative interpretation on the basis of grammatical structure and context. In the carbon steel definition, there are references to a “maximum limit” of other elements (for example, 0.6 percent for copper). If the drafters intended for 0.0005 percent boron content to be a “maximum limit”, they would have used that phrase. By using the phrase “minimum limit” instead, the drafters evidently intended for 0.0005 percent to be a floor, rather than a ceiling.

42. Dr. Collins testified that steel with boron would meet the ASTM definition of alloy steel if an industry specification or a customer specification, to which the steel was being manufactured, required at least 0.0008 percent boron and the boron content conformed to that requirement.<sup>30</sup> He distinguished such a specification from ASTM A36 grade carbon steel, which is an example of a carbon steel grade that does not require boron.<sup>31</sup>

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25. Tribunal Exhibit AP-2010-063-21B at 6-7.

26. *Transcript of Public Hearing*, 13 September 2011, at 81-82.

27. *Ibid.* at 82, 187.

28. *Ibid.* at 136-37.

29. *Transcript of Public Hearing*, 14 September 2011, at 271, 293.

30. *Ibid.* at 271-72, 291-93.

31. *Ibid.* at 291.

43. Dr. Collins' opinion in this regard was not inconsistent with Dr. Perovic's evidence. The latter testified that boron would be "required" when the steel was to be hardened through a quenching and tempering process.<sup>32</sup> He cited AISI/SAE steel designation 15B21H as an example of such a specification.<sup>33</sup> To this end, the Tribunal notes that such hardening and designation require further processing.

44. That being the case, given that the boron content of the goods in issue exceeds 0.0008 percent, the implication is, as Dr. Collins admitted, that the goods in issue would meet the ASTM definition of alloy steel if they were manufactured to conform to a customer or industry specification that required a minimum boron content of 0.0008 percent.<sup>34</sup>

45. A reading of the AISI/SAE definition of carbon steel leads to the same general conclusion. The definition reads as follows:

*Steel is considered to be carbon steel when no minimum content is specified or required for aluminum (Al), chromium (Cr), cobalt (Co), niobium (Nb), molybdenum (Mo), nickel (Ni), titanium (Ti), tungsten (W), vanadium (V) or zirconium (Zr), or any other element to be added to obtain a desired alloying effect; when the specified minimum for copper does not exceed 0.40%; or when the maximum content specified for any of the following elements does not exceed the following percentage: manganese (Mn) 1.65%, silicon (Si) 0.60%, copper (Cu) 0.60. For fine grain carbon steels, minimum or maximum levels of grain refiners (Al, Nb, V) can be specified. **Boron may be added to killed fine grain carbon steel to improve hardenability.***<sup>35</sup>

[Bold added for emphasis]

46. Dr. Perovic testified that the phrase "or any other element to be added to obtain a desired alloying effect" could cover boron.<sup>36</sup> Indeed, the definition expressly notes that boron may be added to carbon steel to improve "hardenability". Thus, on a plain reading of the AISI/SAE definition, where no minimum boron content is required, as appears to be the case here, steel with boron constitutes carbon steel.

47. Similarly, note 2 of the first table in the SAE/AISI Carbon Steel Compositions contained in the SAE Handbook, which lists the chemical composition ranges for various grades of carbon steel, reads as follows:

BORON—Standard killed carbon steels, which are fine grain, may be produced with a boron addition to improve hardenability. Such steels are produced to a range of 0.0005 to 0.003% boron. These steels are identified by inserting the letter "B" between the second and third numerals of the grade number, for example, 10B45. The UNS designation is also modified by changing the last digit to "1" to indicate boron, for example, G10461.<sup>37</sup>

48. This language implies that carbon steel may be produced with up to 0.003 percent boron to improve hardening capability and nevertheless constitute carbon steel. Dr. Perovic agreed with this interpretation.<sup>38</sup> Indeed, this interpretation is consistent with his testimony that boron starts to lose its effectiveness as a hardening agent beyond 0.003 percent.<sup>39</sup> On the basis of this wording, Dr. Perovic was unable to conclude that the goods in issue could be considered alloy steel.<sup>40</sup>

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32. *Transcript of Public Hearing*, 13 September 2011, at 175.

33. *Ibid.* at 172, 174

34. *Transcript of Public Hearing*, 14 September 2011, at 307.

35. Tribunal Exhibit AP-2010-063-21B at 6.

36. *Transcript of Public Hearing*, 13 September 2011, at 132-33.

37. Tribunal Exhibit AP-2010-063-21B, Table 3.

38. *Transcript of Public Hearing*, 13 September 2011, at 167.

39. *Ibid.* at 88.

40. *Ibid.* at 168.

49. The AISI/SAE definition of alloy steel was also discussed. It provides as follows:

*Alloy steel, except for those steels classified as high-strength low-alloy (HSLA), is considered as such when either: (1) the maximum of the range given for the content of alloying elements exceeds one or more of the following limits: manganese, 1.65%; silicon, 0.60%; copper, 0.60%; or (2) **a definite range or a definite minimum quantity of any of the following elements is specified or required within the limits of the recognized field of constructional alloy steels: aluminum, chromium (up to 3.99%), cobalt, niobium, molybdenum, nickel, titanium, tungsten, vanadium, zirconium, or any other alloying element added to obtain a desired alloying effect.***<sup>41</sup>

[Bold added for emphasis]

50. In other words, for the AISI/SAE, steel with boron is only considered alloy steel when a range of boron content or a minimum quantity of boron is specified or required. Dr. Collins offered SAE standard 15B21 as an example of such a specification because, by way of the aforementioned note 2, it requires boron in the range of 0.0005 percent to 0.003 percent.<sup>42</sup>

51. Therefore, while differing to some extent, a reading of the industry definitions indicates that the goods in issue could be considered alloy steel if they were produced to conform to a requirement for a definite range or minimum quantity of boron; otherwise, they are carbon steel.

52. However, there is no evidence that Toyota Tsusho produced the goods in issue in conformity with any such requirement.

53. Dr. Collins testified that the purchase orders would have been very helpful evidence to show that the goods in issue were produced to conform to a customer specification that required boron.<sup>43</sup> However, Toyota Tsusho did not disclose any purchase orders or other such evidence.

54. The balance of the evidence points to the goods in issue having been produced in conformity with ASTM standard A36 (low carbon structural steel), which, as mentioned, does not require any boron. Mill test certificates indicate that Toyota Tsusho designated the goods in issue as “A36-B” or its equivalent, “SA36-B”. Dr. Perovic and Dr. Collins testified that there is no A36-B standard in the industry.<sup>44</sup> He assumed, as does the Tribunal, that Toyota Tsusho added the “B” to indicate that the goods in issue were enhanced with boron.<sup>45</sup>

55. Dr. Perovic was of the view that the goods in issue were not an A36 grade carbon steel because boron is not referred to in that standard and the certificates indicate that the aluminum levels in the goods in issue are atypically high for an A36 grade carbon steel.<sup>46</sup> Dr. Perovic testified that aluminum or titanium is added to steel to combine with nitrogen (“kill the steel”) to free up boron to act as a hardening agent and potentially realize a state of hardness that could not be achieved by A36 grade carbon steel.<sup>47</sup> In his opinion, the aluminum levels indicated on the certificates were sufficient to achieve this affect, and the boron levels of the goods in issue were optimal for effective hardening capability.<sup>48</sup> On the basis of the boron levels and

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41. Tribunal Exhibit AP-2010-063-21B at 7.

42. *Transcript of Public Hearing*, 14 September 2011, at 272-73.

43. *Ibid.* at 310.

44. *Transcript of Public Hearing*, 13 September 2011, at 83; *Transcript of Public Hearing*, 14 September 2011, at 318.

45. *Transcript of Public Hearing*, 13 September 2011, at 83, 90.

46. *Ibid.* at 86.

47. *Ibid.* at 87.

48. *Ibid.* at 87-88.

resultant hardening capability, Dr. Perovic suggested that the goods in issue could have been classified as “standard carbon boron H-steel” grade 15B21H in the AISI/SAE scheme once they had been heat-treated in Canada.<sup>49</sup> However, there are a few problems arising from this testimony.

56. First, Dr. Perovic acknowledged that there was no indication on the certificates of the nitrogen content of the goods in issue, nor was there any evidence of the type of furnace in which the goods in issue were produced, which could have provided a clue to the nitrogen levels.<sup>50</sup> However, he acknowledged that the requisite level of aluminum to fully kill the steel depends on the level of nitrogen.<sup>51</sup> Similarly, Dr. Perovic conceded that he had not conducted, or seen the result of, a test of the hardening capability of the goods in issue.<sup>52</sup> Also, there was uncertainty whether the certificates indicated aluminum only or both aluminum and alumina.<sup>53</sup> Thus, in the Tribunal’s view, Dr. Perovic could not categorically say that the aluminum levels were sufficient to enable the boron to achieve hardening capability beyond that of A36 grade carbon steel.

57. Indeed, Dr. Collins observed that a wide range of aluminum was indicated on the mill test certificates, i.e. from 0.015 percent to 0.06 percent, including alumina in his view, and had concerns that total aluminum at the lower end of this range was insufficient for the boron to be consistently and uniformly effective from plate to plate, as a customer requiring a steel with hardening capabilities would expect.<sup>54</sup>

58. As Toyota Tsusho presumably could have clarified whether the aluminum levels included alumina or disclosed the nitrogen content of its own products or, at least, the type of furnace in which it produced the goods in issue, but did not do so, the Tribunal infers that this information would not have supported Dr. Perovic’s conclusion. Certainly, Toyota Tsusho bears the burden to prove its case, as it has conceded,<sup>55</sup> and, at least in this regard, it has failed to discharge that onus.

59. Second, Dr. Perovic acknowledged that, while A36 does not refer to boron or aluminum, it does not prohibit them.<sup>56</sup> Dr. Collins testified that Evraz Inc. NA produces A36 grade carbon steel with residual levels of copper, nickel and chromium, even though they are not required. According to his experience in the industry, just because A36 is silent on an element generally does not mean that its addition changes the designation of the steel; it would still be an A36 grade carbon steel.<sup>57</sup> Similarly, Dr. Perovic acknowledged that carbon steel typically contains up to 2 percent total alloying elements, and he acknowledged that the mill test certificates indicate that the total alloying elements of the goods in issue, including boron, were significantly less than 2 percent, i.e. in the range of 1.3-1.4 percent.<sup>58</sup>

60. Third, it is well established that the Tribunal is only concerned with the state of the goods at the time of importation.<sup>59</sup> There is no evidence that, at the time of importation, the goods in issue had been heat-treated, and Dr. Perovic testified that the boron does little, if anything, to the properties of plate in that

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49. *Ibid.* at 89, 91-92.

50. *Ibid.* at 101.

51. *Ibid.* at 103, 109, 121-22, 153.

52. *Ibid.* at 128.

53. *Ibid.* at 84-85, 153-54; *Transcript of Public Hearing*, 14 September 2011, at 258-59, 278.

54. *Transcript of Public Hearing*, 14 September 2011, at 259-62, 266-67, 284, 306; Tribunal Exhibit AP-2010-063-20A at para. 20.

55. *Transcript of Public Hearing*, 14 September 2011, at 364-65.

56. *Transcript of Public Hearing*, 13 September 2011, at 150.

57. *Transcript of Public Hearing*, 14 September 2011, at 285-86.

58. *Transcript of Public Hearing*, 13 September 2011, at 137-38.

59. Toyota Tsusho acknowledged this to be the case. *Transcript of Public Hearing*, 14 September 2011, at 367. See also *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT) at para. 26, citing, *inter alia*, *Deputy Minister of National Revenue, Customs and Excise v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366.

state.<sup>60</sup> It is only after the plate is heat-treated by the quenching and tempering process that it achieves a state of hardness that could not be achieved by an A36 grade steel.<sup>61</sup> Dr. Perovic conceded that the goods in issue in their imported state had several elements and properties of the A36 standard and that, even with the boron, were essentially an ASTM A36 grade carbon steel.<sup>62</sup> Dr. Collins concurred with this conclusion.<sup>63</sup>

61. Last, if the goods were produced to conform to AISI/SAE designation 15B21H (which is called a “standard carbon boron H-steel”), that is the designation that logically would have been indicated on the mill test certificates, not “A36-B”.<sup>64</sup>

62. Therefore, in terms of the ASTM and AISI/SAE definitions, the Tribunal is satisfied that the goods in issue constitute carbon steel.

63. Consequently, the Tribunal is left with a tariff classification that supports a finding that the goods in issue are alloy steel and steel industry standards that support a finding that the goods in issue are carbon steel. On the balance, considering that the subject matter is steel, the Tribunal gives more weight to the steel industry standards than to the schedule to the *Customs Tariff*.

64. For all the foregoing reasons, the Tribunal finds that the goods in issue constitute carbon steel and, as such, are of the same description as the goods to which the Order applies.

## DECISION

65. The appeal is dismissed.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Serge Fréchette  
Serge Fréchette  
Member

Stephen A. Leach  
Stephen A. Leach  
Member

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60. *Transcript of Public Hearing*, 13 September 2011, at 89.

61. *Ibid.* at 90, 181.

62. *Ibid.* at 84, 89-90, 106.

63. Tribunal Exhibit AP-2010-063-20A at paras. 18, 20; *Transcript of Public Hearing*, 14 September 2011, at 272.

64. *Transcript of Public Hearing*, 14 September 2011, at 317; Tribunal Exhibit AP-2010-063-20A, Table 4, Figure 1.