CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, March 31, 1993

Appeal No. AP-92-035

IN THE MATTER OF an appeal heard on October 29, 1992, under subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a re-determination of the Deputy Minister of National Revenue for Customs and Excise made pursuant to section 59 of the *Special Import Measures Act* with respect to a request under section 58 of the *Special Import Measures Act*.

BETWEEN

GENERAL ELECTRIC CANADA INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-92-035

GENERAL ELECTRIC CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

The appellant is a manufacturer and importer of consumer and industrial products which it distributes in Canada. The goods in issue are electric motors produced in the Republic of Korea, exported to the United States and then re-exported to Canada. These goods are of the same description as the electric motors covered by a finding of material injury respecting the dumping in Canada of certain electric motors originating in or exported from the United States. The goods in issue were not assessed anti-dumping duties when first exported to Canada from the United States. They were later reassessed, andanti-dumping duties were applied. On appeal of the reassessment, the Deputy Minister of National Revenue for Customs and Excise confirmed the reassessment on the basis that the goods were of the same description as the goods in the above finding. The issue in this appeal is whether the finding applies to the goods in issue and, therefore, whether the goods should be assessed anti-dumping duties.

HELD: *The appeal is allowed. For the finding to apply to electric motors exported from the United States, the goods in issue must not only be of the same description as the goods to which the finding applies but also be produced in a country that has been subject to a dumping investigation and named in the finding. Although the goods in issue are of the same description as those specified in the finding, they were produced in a country not subject to an investigation into dumping and named in the finding. The fact that they were exported to Canada from a country named in the finding does not necessarily make them subject to the finding if they were actually produced in a third country to which the finding does not apply. Accordingly, the anti-dumping duties were applied in error, and the appeal is allowed.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*October 29, 1992*
Date of Decision:	*March 31, 1993*
Tribunal Members:	*Desmond Hallissey, Presiding Member* *Kathleen E. Macmillan, Member* *Arthur B. Trudeau, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Janet Rumball*
Appearances:	*Richard G. Dearden, for the appellant* *Meg Kinnear, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-92-035

GENERAL ELECTRIC CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE **Respondent**

TRIBUNAL: DESMOND HALLISSEY, Presiding Member
KATHLEEN E. MACMILLAN, Member
ARTHUR B. TRUDEAU, Member

REASONS FOR DECISION

This is an appeal under subsection 61(1) of the *Special Import Measures Act*[1] (SIMA) from a re-determination of the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) confirming the reassessment and application of anti-dumping duties on certain shipments of integral horsepower induction motors, one horsepower (1 hp) to two hundred horsepower (200 hp) inclusive, produced in the Republic of Korea (Korea) and subsequently shipped to the United States, prior to being imported into Canada by the appellant. The original reassessment was based on the finding of the Anti-dumping Tribunal, dated April 15, 1983, which found that the dumping of integral horsepower induction motors, 1 hp to 200 hp inclusive, originating in or exported from the United States, was causing material injury to the production of like goods in Canada.[2] The finding was continued by the Canadian International Trade Tribunal (the Tribunal) on October 10, 1990,[3] as part of a review made under section 76 of SIMA, and remains in force.

General Electric Canada Inc. is a manufacturer and importer of consumer and industrial products which it distributes to retailers and other purchasers throughout Canada. The electric motors were purchased by the appellant from its parent corporation in the United States. Anti-dumping duties were not assessed on the goods in issue when they entered Canada on May 30, 1990, under Canada Customs Document No. 14076-025851365. They were reassessed on December 11, 1990, under section 57 of SIMA, and anti-dumping duties were applied. The reassessment was appealed to the Deputy Minister and, by decision dated March 10, 1992, the Deputy Minister confirmed the reassessment on the basis that the electric motors were of the same description as the goods in the finding.

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1. R.S.C. 1985, c. S-15.
2. *Integral Horsepower Induction Motors, One Horsepower (1 hp) to Two Hundred Horsepower (200 hp) Inclusive, Excluding Vertical-Shaft Pump Motors Generally Referred to as Vertical P-Base or Vertical P-Flange Motors, Originating in or Exported from the United States of America*, Inquiry No. ADT-8R-78, April 15, 1983.
3. *Certain Dumped Integral Horsepower Induction Motors, One Horsepower (1 hp) to Two Hundred Horsepower (200 hp) Inclusive, with Exceptions, Originating in or Exported from the United States of America*, Review No. RR-89-013, October 10, 1990.

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The issue in this appeal is whether the finding applies to the goods in issue.

The appellant's first witness was Mr. Jeff B. Irish, Manager-Business Development, GE Motors, General Electric Company (the parent corporation of the appellant). According to Mr. Irish, approximately 80 percent of the total number of electric motors ordered by the appellant would normally be imported directly from Korea, while the balance would be first imported into the United States, where they would be warehoused until needed in Canada. Mr. Irish agreed that the motors, imported into the United States, "entered the commerce" of the United States to the extent that they cleared U.S. customs. He also testified that no anti-dumping duties were paid on those motors imported directly into Canada from Korea.

The appellant's second witness was Mr. James D. McAnsh, Manager-Trade and Commercial Regulatory Services, General Electric Canada Inc. Mr. McAnsh explained, in those instances where the appellant exported certain of the electric motors to the United States and subsequently imported the same motors into Canada, how anti-dumping duties had been applied by Canada Customs, but then refunded so that, in these circumstances, no anti-dumping duties were paid.

Counsel for the appellant began his argument by acknowledging that the goods in issue were of the same description as the goods specified in the finding, that they were exported to the United States from Korea, that they entered the commerce of the United States and that they were exported to Canada from the United States. Counsel submitted that the question before the Tribunal was to determine what goods were affected by the finding. In this regard, he suggested that there were two possibilities: (i) any motors of the subject description, regardless of the country in which the goods were produced and whether that country had been subject to a dumping investigation (which he suggested was the respondent's position); or (ii) any motors of the subject description produced in a country that had been subject to an investigation and had been named in an injury finding. In submitting that the finding should be interpreted as applying only to the second of these two possibilities, counsel developed two related submissions: first, anti-dumping duties may only be imposed on goods from countries that were subject to an investigation by the Deputy Minister; and, second, anti-dumping duties may only be imposed under section 3 of SIMA if there was production of such goods in a country that had been investigated.

In support of his first submission, counsel for the appellant examined the wording of subsection 41(1) of SIMA. He stated that the words "each importer of goods in respect of which the investigation is made" in paragraph 41(1)(*a*) of SIMA indicate that a final determination relates only to importers from those countries that have been investigated. Therefore, in the instant case, the Deputy Minister had no authority, under SIMA, to apply anti-dumping duties on the motors because they were goods from a country that had not been subject to investigation. In further support of this submission, counsel referenced the wording of subsection 43(1) of SIMA, which states that the Tribunal may make an order or finding "with respect to the goods to which the final determination applies." These words, he submitted, limit the application of an order or finding to goods from countries which have been investigated, since these are the only goods to which the final determination applies. Counsel rejected the respondent's position that the words "country of export," found in the final sentence of subsection 43(1) of SIMA, could be interpreted to give the Tribunal the power to name the countries to which its order would apply. At best, counsel suggested, these words should be seen as being used in connection with the naming of a specific supplier in a specific case, which is not applicable here. Counsel also noted that the words "originating in or exported from" did not appear in SIMA, and, thus, it could not be said that they were a condition precedent to making a final determination or finding under SIMA.

Turning to his second submission, counsel for the appellant stated that the basis for this argument, i.e. goods produced in a country that has not been investigated cannot be made subject to anti-dumping duties under section 3 of SIMA, was twofold. First, counsel argued that the language of Article VI of the *General Agreement on Tariffs and Trade*[4] (GATT) and various Articles of the GATT Anti-Dumping Code[5] (the Code) indicate that there must be an element of production of the goods in those countries to which the anti-dumping duties are to be applied. Counsel pointed out that the Code Articles indicate that anti-dumping duties, if they are to be applied, are only to be levied on the importation of "products" of the territory of another contracting party. Counsel submitted that the word "product" or "products" connoted or implied production of some sort. In further support of this proposition, counsel cited Jackson's World Trade and the Law of GATT,[6] where Professor Jackson, in discussing GATT obligations relating to the "origin" or "nationality" of goods, states that, in certain GATT Articles, including those referred to by counsel, obligations are imposed on the treatment of imports that are the "products of the territories of other contracting parties.[7]" Counsel concluded that, to trigger rights or obligations under these provisions of GATT, there must have been production of the goods in the country against which an order or finding was being made, before it could be made. Again, in the instant case, there is no such "production" connection between the finding and Korea.

Counsel for the appellant cited *National Corn Growers Assn. v. Canada (Import Tribunal)*[8] as supporting two important propositions underlying his argument. First, GATT and related GATT Codes could be used by the Tribunal as aids to interpretation even in the absence of ambiguity in the legislative text. Second, SIMA must be interpreted in a manner consistent with Canada's obligations under those treaties. Counsel added that any interpretation of sections 3 and 43 of SIMA, which resulted in anti-dumping duties being applied to a country that had not been under investigation or inquiry, would result in not only an absurd result but also one inconsistent with Canada's treaty obligations.

Counsel for the respondent began her submissions by referencing the facts to which the appellant had agreed and by noting that the finding stated that it applied to goods of the relevant description "originating in or exported from the United States." Counsel submitted that, as the motors were "exported from" the United States to Canada, then the finding clearly applied to the motors, and the anti-dumping duties were properly applied. Counsel stated that the key word in the phrase "originating in or exported from" was the word "or." Counsel submitted that the appellant's interpretation of the finding ignored this word and replaced it with "and," and the fact was that the finding simply did not use that word.

Counsel for the respondent argued that the Tribunal had the power under section 43 of SIMA to make the finding that it considered appropriate. This power, counsel asserted, was derived from the words "as the nature of the matter may require" in subsection 43(1) of SIMA. These words, counsel suggested, give the Tribunal great latitude in making its orders or findings. Counsel argued that, in the instant case, the Tribunal used the words that it considered appropriate, and the respondent had no choice but to apply those words as he did. In support of these arguments, counsel also referred to the Tribunal's review of the finding and, in

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4. Basic Instruments and Selected Documents, Volune IV, Geneva, March 1969.
5. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.
6. John H. Jackson, (Charlottesville, VA: Michie, 1969).
7. *Ibid.* at 465.
8. [1990] 2 S.C.R. 1324.

particular, to its discussion of the *Hitachi* case[9] in its statement of reasons. With respect to the interpretation of its powers under subsection 43(1) of SIMA, counsel cited the following passage in which the Tribunal indicated that it read *Hitachi* as meaning that:

> *a finding rendered under subsection 43(1) is not required to be exporter-specific or applicable only to those exporters found to have dumped goods in Canada at the time that the dumping investigation or material injury inquiry was conducted. Indeed, the finding may be made country-wide in application. In the Tribunal's view, this finding accords with the scheme of SIMA and the intention of Parliament in enacting the legislation.*[10]

Counsel for the respondent suggested that the appellant, while not urging that the finding be seen as exporter-specific, was urging that it be seen as country-specific. Counsel submitted that the Tribunal should reject this proposition and interpret section 43 of SIMA more broadly, in a manner consistent with the wording of the finding. In this respect, counsel urged the Tribunal to consider not whether Korea was previously under investigation, which she asserted was not relevant here, but whether the wording of the finding included the motors produced in, and exported from, Korea.

Turning to the appellant's use of GATT and the GATT Codes to assist in interpreting SIMA, counsel for the respondent stated that *National Corn Growers* stood for the proposition that international treaties may be resorted to as interpretive aids only where there was ambiguity. Counsel submitted that, here, there is no ambiguity as to the wording of either section 43 of SIMA or the finding.

The Tribunal is not aware of any previous decision that has addressed the specific issue before it in this case. As counsel for the appellant noted, such issue was raised in the *Jeumont-Schneider* case,[11] but the Tribunal was not required to speak to it. The Tribunal is thus mindful of the importance of considering this issue in light of the fact that the primary purpose of SIMA is to protect Canadian manufacturers and producers of like goods from material injury caused by the importation of dumped and/or subsidized goods.[12]

In the Tribunal's opinion, the wording of sections 3, 31, 38, 41, 42 and 43 of SIMA does not allow for the application of anti-dumping duties in this case. The Tribunal believes that these sections restrict the application of a final determination of the Deputy Minister or an order or finding of the Tribunal to exporters in those countries that have been subject to an investigation or inquiry. This follows from the wording in paragraph 41(1)(*a*) of SIMA which states that the final determination is to be made with respect to "the goods." The Tribunal believes that, in the context of this paragraph, the expression "the goods" refers to the goods of each importer "in respect of which the investigation is made" since these are the only "goods"

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9. *Hitachi et al. v. the Anti-dumping Tribunal et al.*, [1979] 1 S.C.R. 93.

10. *Supra*, note 3 at 9.

11. *Certain Power Conversion Systems and Rectifiers Imported from, Supplied by or Otherwise Introduced into the Commerce of Canada by, or on Behalf of, Jeumont-Schneider (France), Fuji Electric Co. Ltd. or Toshiba Corporation (Japan),* Canadian Import Tribunal (formerly the Anti-dumping Tribunal), Inquiry No. ADT-13-84, January 31, 1985; [1985] 8 C.E.R. 207.

12. See, for instance, *Electrohome Ltd. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1986] 2 F.C. 344; *Solid Urea Originating in or Exported from the German Democratic Republic and the Union of Soviet Socialist Republics for Use or Consumption in Eastern Canada (Canadian Territory East of the Ontario-Manitoba Border)*, Canadian Import Tribunal, Inquiry No. CIT-9-87, December 24, 1987; [1989] 15 C.E.R. 277.

mentioned in the subsection prior to the wording referenced above. The "investigation" is made by the Deputy Minister under section 31 of SIMA, and the "goods" are those with which the investigation is concerned. These "goods" are the goods to which any preliminary determination made under section 38 of SIMA applies and become the focus of an inquiry by the Tribunal under paragraph 42(1)(*a*) of SIMA, which states that an inquiry is to deal with "any goods to which the preliminary determination applies."

Therefore, a final determination can only be interpreted as applying to goods from countries that were subject to an investigation. It follows from this that the phrase "goods to which the final determination applies" in subsection 43(1) of SIMA must be understood in a manner consistent with the Tribunal's interpretation of subsection 41(1) of SIMA, and, therefore, any order or finding which the Tribunal might make under subsection 43(1) of SIMA would only apply to goods from countries subject to the Deputy Minister's investigation and, then, only to goods from those countries expressly named in the finding. Finally, this interpretation of to what goods an order or finding of the Tribunal under section 43 of SIMA applies forms the basis for the imposition of anti-dumping duties under section 3 of SIMA. Since the Tribunal has concluded that its order or finding applies only to goods from those countries named in the finding that were actually subject to an investigation by the Deputy Minister, then, in the instant case, the finding could not have been meant to be applied to the goods in issue, since they were produced in a country, Korea, that was not subject to the investigation that preceded the finding and was not named in the finding.

In addition, the Tribunal notes that the phrase "originating in or exported from" does not appear in SIMA. This wording was adopted by the Tribunal from the Deputy Minister's preliminary determination in this case. In forming the class of goods for the purposes of preliminary (and final) determinations, the Deputy Minister has, since the early 1970s, generally referred to "goods originating in or exported from." Presumably, this was done to ensure that goods would not be transshipped to a country not subject to the finding, in order to avoid anti-dumping duties.

Therefore, even though the motors are of the same description as the goods in the finding, the finding cannot be applied to them because they were not produced in a country named in the finding. If the Tribunal were to do otherwise in the instant case, it would be protecting the Canadian market from goods that have not been determined to be dumped and causing material injury and, thus, would be distorting the primary purpose of SIMA.

Accordingly, the appeal is allowed.

Desmond Hallissey
Desmond Hallissey
Presiding Member

Kathleen E. Macmillan
Kathleen E. Macmillan
Member

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