



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal EA-2021-004

Allyco Supply Co. Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, August 28, 2023*

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IN THE MATTER OF an appeal heard on August 22, 2022, pursuant to subsection 61(1) of the *Special Import Measures Act*;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated November 22, 2021, made pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

ALLYCO SUPPLY CO. LTD.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

Place of Hearing: Ottawa, Ontario (file hearing)
Date of Hearing: August 22, 2022

Tribunal Panel: Randolph W. Heggart, Presiding Member

Tribunal Secretariat Staff: Yannick Trudel, Counsel
Kalyn Eadie, Counsel
Geneviève Bruneau, Registrar Officer

PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

INTRODUCTION

[1] This is an appeal by Allyco Supply Co. Ltd. (Allyco) filed on December 20, 2021, pursuant to subsection 61(1) of the *Special Import Measures Act*¹ (SIMA), from a re-determination of the President of the Canada Border Services Agency (CBSA) made on November 22, 2021, pursuant to section 59 of SIMA, with respect to the imposition of anti-dumping (AD) and countervailing (CV) duties on fether drive screws or spikes imported from the People's Republic of China (China) by Allyco (the goods in issue).

[2] There are two main issues in this appeal. The first is whether the goods in issue are of the same description as goods to which the Tribunal's finding concerning certain carbon steel screws originating in or exported from China and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) applies and therefore fall within the scope of that finding.

[3] Provided that the goods in issue do fall within the scope of that finding, the second issue is whether the normal value (NV) applicable to the goods should be that determined pursuant to a ministerial specification made under subsection 29(1) of SIMA, as determined by the President of the CBSA, or that determined in accordance with sections 15 to 23 of SIMA based on new information provided by Allyco in the present appeal, as claimed by Allyco.

PROCEDURAL HISTORY

[4] On December 9, 2004, the President of the CBSA made a final determination of dumping with respect to certain carbon steel and stainless steel fasteners, including certain carbon steel screws, originating in or exported from China and Chinese Taipei and made a final determination of subsidizing with respect to the same products originating in or exported from China. The CBSA indicated that the NVs for goods of non-cooperating exporters (i.e., exporters that failed to provide an adequate response to the CBSA's questionnaires) would be determined pursuant to a ministerial specification, made under subsection 29(1) of SIMA, by advancing the export price of the goods by 170%.² The CBSA also indicated that an amount of subsidy of 1.25 Chinese renminbi per kilogram of imported goods had been established for all Chinese exporters pursuant to a ministerial specification made under subsection 30.4(2) of SIMA.³

[5] On January 7, 2005, the Tribunal made a finding, pursuant to subsection 43(1) of SIMA, that the dumping in Canada of certain carbon steel screws originating in or exported from China and Chinese Taipei and the subsidizing of such products originating in or exported from China had caused injury to the domestic industry, that is, to the domestic producers of carbon steel screws that are identical or similar to the imported goods.⁴ Accordingly, AD duties were imposed on subject

¹ R.S.C., 1985, c. S-15.

² See paragraphs 51, 53 and 55 of the CBSA's statement of reasons for its final determinations of dumping and subsidizing, online: <<https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1308/ad1308f-eng.html>>. The CBSA also established specific NVs for exporters that provided a complete response to its questionnaires.

³ *Ibid.* at paras. 83–84. The Tribunal notes that, during subsequent re-investigations, the CBSA calculated significantly lower amounts of subsidy for certain exporters.

⁴ *Certain Fasteners* (7 January 2005), NQ-2004-005 (CITT) [*Fasteners NQ*]. The Tribunal also made findings with respect to stainless steel screws, as well as carbon steel and stainless steel nuts and bolts. These other

carbon steel screws imported into Canada at prices below the NVs established by the CBSA during its investigation (or subsequent re-investigations),⁵ and CV duties were imposed on all subject carbon steel screws imported from China.⁶

[6] Following the conduct of expiry reviews pursuant to section 76.03 of SIMA, the Tribunal made orders continuing, with amendment, its finding on three separate occasions.⁷

[7] Allyco imported the goods in issue on June 1, 2020. The goods were purchased from an exporter in China (the Exporter) and shipped from the Port of Shanghai to Vancouver, British Columbia.⁸

[8] Allyco self-assessed the AD and CV duties payable on the goods in issue in accordance with the relevant ministerial specifications, as the CBSA had not established specific NVs or amounts of subsidy for the Exporter. Allyco paid AD duties in an amount equal to 170% of the export price of the goods, and CV duties in the amount of 1.25 Chinese renminbi per kilogram.⁹

[9] On June 5, 2020, Allyco requested that the CBSA conduct a normal value review (NVR) for the goods in issue.¹⁰

[10] On June 12, 2020, Allyco filed an adjustment request pursuant to paragraph 74(1)(d) of the *Customs Act*, in order to obtain a refund of the AD duties that it had self-assessed and paid.¹¹ Allyco claimed that the goods in issue were “custom made fetter (umbrella threads) point drive” screws used by the British Columbia Hydro and Power Authority (BC Hydro) for pole lines and therefore not “regular” screws. The CBSA treated the adjustment request as a request for re-determination made under subsection 56(1.01) of SIMA.¹²

findings are not relevant for the purposes of the present appeal. In these reasons, reference to “the Tribunal’s finding” is to be understood as a reference to the Tribunal’s finding with respect to carbon steel screws.

⁵ Subsection 3(1) of SIMA provides that AD duties are to be levied in an amount equal to the “margin of dumping”, which is defined under subsection 2(1) as the amount by which the NV of the goods exceeds the export price of the goods. Under Canada’s prospective duty enforcement system, liability for AD duties may be eliminated by increasing the selling price of the goods (i.e., the export price of the goods) to a level that is equal to or above the specific NVs established by the CBSA in advance of importation. However, liability for AD duties may not be eliminated where NVs are established pursuant to a ministerial specification as an advance over export price.

⁶ Subsection 3(1) of SIMA provides that CV duties are to be levied in an amount equal to the amount of subsidy on the imported goods, which amount is established pursuant to section 30.4. Unlike AD duties, liability for CV duties may never be eliminated by increasing the selling price of the goods.

⁷ See *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT); *Certain Fasteners* (5 January 2015), RR-2014-001 (CITT); *Carbon Steel Screws* (2 September 2020), RR-2019-002 (CITT) [*Carbon Steel Screws*].

⁸ Exhibit EA-2021-004-05.A (protected) at 24–27.

⁹ *Ibid.* at 29. Through the operation of subsection 56(2) of SIMA, determinations referred to in subsection 56(1) regarding the subjectivity (i.e., whether imported goods fall within the scope of a finding), NV and export price of, and the amount of subsidy on, the goods in issue were deemed to have been made by Allyco.

¹⁰ *Ibid.* at 31–32.

¹¹ *Ibid.* at 30.

¹² The proper provision under which to seek a refund of AD duty or a review of NVs is subsection 56(1.01) of SIMA and not paragraph 74(1)(d) of the *Customs Act*. See Exhibit EA-2021-004-05 at 4 (para. 10).

[11] On January 25, 2021, the CBSA initiated an NVR to establish a specific NV for the goods in issue. Letters were sent to the Exporter and Allyco notifying them of the NVR and indicating that a failure to provide complete responses to the CBSA's requests for information would result in NVs being established by way of ministerial specification (i.e., by advancing the export price of the goods by 170%).¹³

[12] On February 10, 2021, the CBSA made a re-determination under section 57 of SIMA confirming that the goods in issue fell within the scope of the Tribunal's finding and therefore denying Allyco's request for a refund of AD duties paid at the time of importation.¹⁴ The CBSA also noted that no NVs had yet been established as part of its NVR.

[13] On March 2, 2021, even though the CBSA had already initiated an NVR, Allyco again requested that the CBSA conduct one for the goods in issue.¹⁵

[14] On March 9, 2021, Allyco filed a request for re-determination pursuant to subsection 58(1.1) of SIMA, again claiming that AD duties were not owing on the goods in issue as they were "custom made fetter (umbrella threads) point drive" screws and not "construction" screws.¹⁶

[15] On October 7, 2021, the CBSA concluded its NVR and informed both the Exporter and Allyco that the information provided by the Exporter was insufficient to establish a specific NV for the goods in issue.¹⁷ The CBSA indicated that the NV of all future shipments by the Exporter, and of any goods that were the subject of a request for re-determination that had not yet been processed (as was the case for the goods in issue), would be established by way of ministerial specification by advancing the export price of the goods by 170%.

[16] On November 22, 2021, the President of the CBSA determined, pursuant to section 59 of SIMA, that the goods in issue fell within the scope of the Tribunal's finding and, on the basis of ministerial specifications, were subject to AD duties in an amount equal to 170% of the export price of the goods, and CV duties in the amount of 1.25 Chinese renminbi per kilogram.¹⁸ In its decision, the CBSA explained that it had made several attempts to obtain the information required to establish a specific NV for the goods in issue but that, ultimately, there remained critical deficiencies in the information provided by the Exporter.¹⁹

[17] On December 20, 2021, Allyco filed a notice of appeal with the Tribunal pursuant to subsection 61(1) of SIMA.

¹³ Exhibit EA-2021-004-05.A (protected) at 37–39, 49–51. Since Allyco had already paid AD duties in an amount equal to 170% of the export price of the goods in issue (in accordance with the relevant ministerial specification), it could not incur any additional AD duty liability.

¹⁴ *Ibid.* at 61–64.

¹⁵ *Ibid.* at 66–69.

¹⁶ *Ibid.* at 65.

¹⁷ *Ibid.* at 76–78, 91–95.

¹⁸ Exhibit EA-2021-004-01.B at 3–11. In performing the calculations required to determine the amount of AD and CV duties that were applicable, the CBSA found that an error had been made in the weight used in the original calculations, resulting in a very small and inconsequential additional amount of duties owing.

¹⁹ *Ibid.* at 3.

[18] On August 22, 2022, the Tribunal held a hearing on the basis of written submissions (i.e., without the presence of the parties).²⁰

GOODS IN ISSUE

[19] The goods in issue are a type of carbon steel lag screw, which Allyco refers to as fetter drive screws or spikes. They have a square head, hammer drive, “umbrella” threads and a pointed end, are hot dip galvanized, and are 3/8” in diameter and 3” in length.²¹ According to Allyco, the goods in issue are used solely by BC Hydro for the purpose of securing components to pole lines.²² With their upward (“umbrella”) threads, installation is typically done by striking the screws/spikes into the poles like a nail.²³

[20] None of the parties filed physical exhibits.

LEGAL FRAMEWORK

[21] Appeals pursuant to subsection 61(1) of SIMA are available to persons who deem themselves “aggrieved by a re-determination of the President [of the CBSA] made pursuant to section 59 with respect to any goods”. Under section 59, the President may re-determine any determination or re-determination referred to in section 55, 56 or 57, or made under section 59. These determinations or re-determinations pertain to five elements: the subjectivity, NV and export price of imported goods, as well as the amounts of subsidy and export subsidy, if any, on those goods.²⁴ All of these elements ultimately have a bearing on any AD and CV duty liability for imported goods.

[22] Indeed, subsection 61(3) of SIMA allows the Tribunal to “... 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 ...”

[23] In the present case, the issues under appeal relate to the subjectivity and NV of the goods in issue, the first being determinative of whether any AD and CV duties are applicable, and the second having a bearing on the quantum of AD duties payable. To the extent that the goods in issue fall within the scope of the Tribunal’s finding, Allyco does not take issue with their export price or the amount of subsidy on them.

FIRST ISSUE: DO THE GOODS IN ISSUE FALL WITHIN THE SCOPE OF THE TRIBUNAL’S FINDING?

[24] Pursuant to subsection 3(1) of SIMA, AD and CV duties apply to dumped and subsidized goods imported into Canada that are of the same description as goods in respect of which the Tribunal has made a finding of injury, retardation or threat of injury under section 43. In the present appeal, the Tribunal must therefore determine whether the goods in issue are of the same description

²⁰ The decision to proceed with a file hearing was taken following a case management conference with the parties on June 24, 2022. See Exhibit EA-2021-004-24.

²¹ Exhibit EA-2021-004-05.A (protected) at 19–20, 26. Photographs of the goods in issue are found at Exhibit EA-2021-004-05.A (protected) at 21–22.

²² Exhibit EA-2021-004-12 at 3; Exhibit EA-2021-004-25.A (protected) at 8; Exhibit EA-2021-004-25 at 5.

²³ Exhibit EA-2021-004-25 at 5.

²⁴ See paragraphs 55(1)(c), (d) and (e), and 56(1)(a), (b) and (c) of SIMA. See also *Ferrostaal Metals GmbH v. President of the Canada Border Services Agency* (2 July 2020), EA-2019-001 (CITT) [*Ferrostaal*] at para. 35.

as goods to which the Tribunal's finding concerning certain carbon steel screws originating in or exported from China and Chinese Taipei applies.

[25] The Tribunal's finding in inquiry NQ-2004-005 broadly covers carbon steel screws "that are used to mechanically join two or more elements" and those that fall within the parameters set out in list A2 of Appendix A to the finding.²⁵ This list includes square and hex lag screws with diameters ranging from #14 (1/4") to #24 (3/8") and lengths ranging from 3/4" to 4".

[26] There is no dispute that the goods in issue are a type of carbon steel lag screw, have a square head, are 3/8" in diameter and 3" in length, and were exported from China. They are also clearly used to mechanically join two or more elements and, while they can be driven like a nail, they can also be tightened or released by torquing their head. Thus, upon initial examination, the goods in issue appear to fall within the scope of the Tribunal's finding.

Are the goods in issue covered by the Tribunal's exclusions?

[27] In its submissions to the Tribunal and in its request for re-determination to the CBSA, Allyco noted that the goods in issue are similar in design and function to screw spikes used for railroads, which are not subject to AD and CV duties.²⁶ Indeed, the Tribunal's finding does specifically exclude certain carbon steel screws from its application, including "screw spikes RR", with the reference to railroads denoted by the "RR".²⁷ Although Allyco did not expressly state that the goods in issue should benefit from this exclusion, such an argument could be implied from its submissions.

[28] The CBSA chose to address the issue in its submissions. It contended that available definitions indicate that a "screw spike RR" is used to "connect steel elements of a track structure with wooden or concrete sleepers"²⁸ and that Allyco failed to provide any evidence to show that the goods in issue *will* be used for that purpose. The CBSA added that Allyco in fact confirmed that the goods in issue are not used on railroads, but rather, on BC Hydro pole lines.

[29] As the Tribunal has previously stated, where the question is whether imported goods are *excluded* from the scope of a finding, the relevant question is whether the goods are of the same description as the excluded products.²⁹ The starting point of the analysis is the ordinary meaning of the words of the exclusion under consideration.³⁰

[30] In the Tribunal's view, the ordinary meaning of the words "screw spike RR" is clear. They unambiguously indicate that the excluded screws (spikes) are those used in railroad applications. Yet, the evidence on the record shows that the goods in issue were used solely by BC Hydro for the

²⁵ The Tribunal notes that the finding *excludes* carbon steel screws that are not within the parameters of list A2, which effectively means that it can only cover the listed carbon steel screws. *See also Fasteners NQ* at para. 19, where a screw is defined as a "headed and externally threaded mechanical device that possesses capabilities which permit it to be inserted into holes in assembled parts, to be mated with a pre-formed internal thread or to form its own thread, and to be tightened or released by torquing its head."

²⁶ Exhibit EA-2021-004-12 at 4; Exhibit EA-2021-004-25 at 2-3; Exhibit EA-2021-004-05.A (protected) at 20-23.

²⁷ See list A1 of Appendix A to the Tribunal's finding in inquiry NQ-2004-005.

²⁸ See Exhibit EA-2021-004-05 at para. 35 and footnote 28.

²⁹ See, for example, *Robertson Inc. v. President of the Canada Border Services Agency* (25 January 2016), EA-2014-002 and EA-2014-003 (CITT) [*Robertson*] at para. 20.

³⁰ *Robertson* at para. 21.

purpose of securing components to pole lines.³¹ The Tribunal notes that Allyco did not claim that the goods in issue were *capable* of being used in railroad applications. However, even if it had, as the Tribunal stated in *Robertson*, it is insufficient to demonstrate that imported goods are merely capable of being used for a purpose specified by an exclusion—*actual* use is required.³² In any event, photographs provided by Allyco show that, while the goods in issue and screw spikes used in railroad applications may both have umbrella threads, they otherwise differ significantly in appearance and physical characteristics such that they could not reasonably be considered as the same product.³³

[31] Based on the foregoing, the Tribunal concludes that the goods in issue are not of the same description as the excluded “screw spikes RR” and that, as such, they fall within the scope of the Tribunal’s finding. The goods in issue are therefore subject to the imposition of AD and CV duties.

A request for product exclusion cannot be considered in the context of an appeal under subsection 61(1) of SIMA

[32] In its submissions to the Tribunal, Allyco also requested that the goods in issue be exempted from the application of the Tribunal’s finding concerning carbon steel screws.³⁴ More specifically, it submitted that fetter drive screws or spikes are not produced in Canada and that, as a result, they should be excluded just like screw spikes for railroads.

[33] In response, the CBSA submitted that an appeal pursuant to section 61 of SIMA is not the proper forum in which to request an exclusion from a Tribunal finding. It added that, in any event, the record does not contain evidence which would allow the Tribunal to conclude that excluding fetter drive screws or spikes from its finding would not cause injury to the domestic industry.

[34] As mentioned above, appeals pursuant to subsection 61(1) of SIMA are appeals of re-determinations made by the President of the CBSA under section 59. These re-determinations pertain to the subjectivity (i.e., whether imported goods fall within the scope of an *existing* finding), NV and export price of imported goods, as well as the amounts of subsidy and export subsidy, if any, on those goods. In other words, appeals pursuant to subsection 61(1) pertain to the *enforcement* of Tribunal findings by the CBSA. The Tribunal is without legal authority to grant exclusions (i.e., to amend its findings) in the context of such appeals.

[35] The question as to whether to exclude certain products from the application of an existing finding is one that can only be considered by the Tribunal in the context of an interim review pursuant to section 76.01 of SIMA or of an expiry review pursuant to section 76.03 (provided it first determines that the expiry of the finding is likely to result in injury to the domestic industry). Such reviews, which examine questions of injury or harm to the domestic industry, and in which domestic producers typically participate, allow the Tribunal to rescind a finding in its entirety or, in the case where the granting of a product exclusion will not cause injury to the domestic industry, continue a finding with amendment.³⁵

³¹ Exhibit EA-2021-004-12 at 3; Exhibit EA-2021-004-25.A (protected) at 8; Exhibit EA-2021-004-25 at 5.

³² *Robertson* at para. 25.

³³ Exhibit EA-2021-004-05.A (protected) at 22.

³⁴ Exhibit EA-2021-004-12 at 6; Exhibit EA-2021-004-25 at 1–2; Exhibit EA-2021-004-28 at 1–2.

³⁵ See subsections 76.01(5) and 76.03(12) of SIMA. Exclusions are an extraordinary remedy that may be granted at the Tribunal’s discretion, that is, when it is of the view that such exclusions will not cause injury to the domestic industry. The Tribunal notes that, in the most recent expiry review of its finding, it identified seven domestic

[36] Accordingly, the question of whether an exclusion should be granted for fender drive screws or spikes is not properly before the Tribunal in the present appeal. The Tribunal notes that an expiry review of its finding concerning carbon steel screws will not be initiated until 2025. However, it remains open to Allyco to file a request for the Tribunal to conduct an interim review of that finding for the purpose of excluding certain products from its application.³⁶

SECOND ISSUE: WHAT IS THE NORMAL VALUE OF THE GOODS IN ISSUE?

[37] Pursuant to subsection 3(1) of SIMA, once imported goods are determined to fall within the scope of a Tribunal finding, AD duties “in an amount equal to the margin of dumping” of the goods are to be paid by the importer. Subsection 2(1) defines “margin of dumping” as “... the amount by which the normal value of the goods exceeds the export price of the goods”. Therefore, the NV of imported goods has a direct bearing on the amount of AD duties payable on those goods.

[38] Subsection 2(1) of SIMA defines “normal value” as the “... normal value determined in accordance with sections 15 to 23 and 29 and 30”. Under these provisions, the NV of goods that are imported from an exporter is generally the amount for which that exporter sells like goods (i.e., goods that are identical or similar to the imported goods) in its own country, or the aggregate of the cost of production of the imported goods combined with a reasonable amount for administrative, selling and all other costs, and a reasonable amount for profits derived from the exporter’s sales of like goods in its domestic market.³⁷ Such NVs are typically expressed in a currency amount and are referred to as specific NVs.

[39] In cases where sufficient information is not provided or is not available to enable the determination of NVs in the manner described above, subsection 29(1) of SIMA allows for the NVs to be determined in such manner as the Minister specifies. NVs established pursuant to ministerial specifications are generally expressed as an advance over export price, which usually results in a much less favourable outcome for the importer.³⁸

[40] At the time of importation, Allyco paid AD duties on the goods in issue in an amount equal to 170% of the export price of the goods, as the CBSA had not established specific NVs for the Exporter. The NV of the goods therefore had to be determined in accordance with a ministerial specification made pursuant to subsection 29(1) of SIMA. In its decision under section 59, the President of the CBSA determined that the goods in issue remained subject to AD duties in an amount equal to 170% of the export price of the goods, as the information provided by the Exporter in the context of the CBSA’s NVR was deemed insufficient to establish a specific NV.

producers of carbon steel screws covered by the product definition and found that five of these constituted the domestic industry for the purposes of the expiry review (see *Carbon Steel Screws* at paras. 32, 47–48).

³⁶ Additional information regarding interim reviews and requests for product exclusions is available on the Tribunal’s website at <https://citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/anti-dumping-injury-inquiry-forms-practices-and-procedures>. Pursuant to subsection 76.01(3) of SIMA, the Tribunal will not conduct an interim review at the request of any person unless the person satisfies the Tribunal that the review is warranted.

³⁷ See section 15 and paragraph 19(b) of SIMA and sections 11 and 13 of the *Special Import Measures Regulations*. Under certain circumstances, which are defined in paragraphs 20(1)(a) and (b) of SIMA, NVs can be based on the price or costs of like goods in a country other than the country of export. Section 30 is not relevant in the context of the present appeal.

³⁸ As previously explained, liability for AD duties may not be eliminated where NVs are established pursuant to a ministerial specification as an advance over export price.

[41] In the present appeal, Allyco acknowledged that the Exporter failed to provide the CBSA with the information that was requested during the NVR in order to establish a specific NV.³⁹ However, it noted that, on previous occasions where it imported identical fether drive screws or spikes from the Exporter, the CBSA had established specific NVs based on information Allyco claimed was exactly the same as that provided by the Exporter during this NVR.⁴⁰ Further, Allyco requested that the Tribunal consider new information it provided on behalf of the Exporter in these appeal proceedings, which it hoped would be sufficient to establish a specific NV for the goods in issue.

[42] The CBSA submitted that, even if Allyco had a legitimate expectation that it would not be asked for information that was different from that which was previously requested, or for additional information, this does not give rise to substantive rights and, in any event, is not relevant in this case. It further submitted that the Tribunal should not consider the new information provided by Allyco in the present appeal, but that, even if the information was considered, it remains deficient such that the CBSA would be unable to establish a specific NV for the goods in issue. In the CBSA's view, the correct amount of AD duties was paid on the goods in issue.

[43] Before deciding whether the NV applicable to the goods in issue should be that determined pursuant to a ministerial specification made under subsection 29(1) of SIMA or that determined based on the methodologies set out in sections 15 to 23, the Tribunal will first address Allyco's implied claim that the CBSA created legitimate expectations.

The issues of legitimate expectations and procedural fairness are not relevant in the context of the present appeal

[44] It is well established that the doctrine of legitimate expectations does not give rise to substantive legal rights, but only the granting of appropriate procedural remedies.⁴¹ Therefore, even if the CBSA had created the legitimate expectation that it would not ask for information that was different from what it had previously requested to establish NVs, or for additional information, this would only result in the requirement that the CBSA provide the Exporter with a greater degree of procedural fairness. It would neither change the nature and extent of the information ultimately required by the CBSA to calculate NVs in accordance with sections 15 to 23 of SIMA nor give the Exporter the right to provide the CBSA with anything less than that information.

[45] Aside from the fact that Allyco provided no documentary evidence indicating the nature and extent of the information previously requested from the Exporter by the CBSA, the evidence on the record does suggest that the CBSA was procedurally fair in the present case by sending a deficiency letter to the Exporter after it received an initial response to the request for information (RFI) sent as part of the NVR, as well as by sending four supplemental RFIs to the Exporter seeking clarification and additional information.⁴²

³⁹ Allyco stated that a specific NV could not be established during the NVR due to the "language barrier and lack of understanding of CBSA requirements" on the part of the Exporter. See Exhibit EA-2021-004-12 at 3.

⁴⁰ See Exhibit EA-2021-004-12.A (protected) at 7-35.

⁴¹ See, for example, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) at para. 97.

⁴² Exhibit EA-2021-004-05.A (protected) at 13-14, 108-116.

[46] Regardless, the Tribunal has repeatedly held that it does not have jurisdiction to consider issues of procedural fairness as standalone grounds of appeal. In *Toyota Tsusho*, for example, the Tribunal stated that it “does not have the authority to consider, in appeals pursuant to section 61 of SIMA, issues of natural justice and procedural fairness relating to the manner in which the CBSA’s decision was reached.”⁴³ Therefore, the Tribunal finds that the issues of legitimate expectations and procedural fairness are not relevant in the context of the present appeal. Appeals before the Tribunal proceed *de novo* and the decision that is eventually rendered is one based on the Tribunal’s interpretation and application of the law to the facts on the record.

The information provided by the Exporter during the NVR was not sufficient to establish a specific NV for the goods in issue

[47] The CBSA submitted that, even after an RFI, a deficiency letter, and four supplemental RFIs were sent to the Exporter, it failed to provide sufficient information to allow for the establishment of a specific NV for the goods in issue. As noted above, Allyco acknowledged that the Exporter failed to provide the CBSA with sufficient information during the NVR.

[48] At the conclusion of the NVR, the CBSA informed the Exporter that the information it provided was incomplete and unreliable for the purposes of determining NVs. It also compiled a summary of certain issues, which it considered material, that were observed in the responses provided by the Exporter.⁴⁴ The issues that were addressed included missing domestic sales information and supporting documentation, missing or incomplete costing information, costing information provided without supporting documentation or explanation, and insufficient information respecting the Exporter’s financial accounting system and its accounting/costing practices.⁴⁵

[49] The Tribunal agrees that these deficiencies were such that it was not possible for the CBSA to properly establish an NV for the goods in issue under sections 15 to 23 of SIMA and, more specifically, under section 15 or paragraph 19(b). The President of the CBSA was therefore correct in determining that the NV applicable to the goods in issue was that determined by advancing the export price of the goods by 170% in accordance with a ministerial specification made under subsection 29(1).

The new information provided by Allyco in the present appeal is still not sufficient to establish a specific NV for the goods in issue

[50] In these appeal proceedings, Allyco requested that the Tribunal consider new information it provided on behalf of the Exporter, which purportedly addresses the deficiencies identified by the CBSA at the conclusion of the NVR.⁴⁶ After the CBSA noted that this new information was not provided by the Exporter and was not accompanied by a certificate of veracity, Allyco proceeded to file a certificate signed by the sales manager of the Exporter who certified that the information provided by Allyco on its behalf was “correct and accurate”.⁴⁷

⁴³ *Toyota Tsusho America Inc. v. President of the Canada Border Services Agency* (27 April 2011), AP-2010-063 (CITT) at para. 6. See also *Robertson* at para. 12; *Ferrostaal* at paras. 69–70.

⁴⁴ Exhibit EA-2021-004-05.A (protected) at 88–89. The CBSA was careful to add that the summary was not exhaustive and that it had observed additional issues that were not addressed.

⁴⁵ *Ibid.*

⁴⁶ See Exhibit EA-2021-004-03.A (protected) at 13–40; Exhibit EA-2021-004-03.B at 12–35.

⁴⁷ Exhibit EA-2021-004-12.A (protected) at 36.

[51] However, the CBSA also noted that the practice of accepting new information after the completion of an NVR was considered and rejected by the Tribunal in *Fletcher Leisure Group Inc. v. The Deputy Minister of National Revenue for Customs and Excise*.⁴⁸ In that case, both the manufacturer and exporter of alpine ski poles imported into Canada by the appellant failed to provide information requested by the Deputy Minister (now the President of the CBSA), including information requested during a general reinvestigation.⁴⁹ While recognizing that sufficient information had not been provided to allow the determination of an NV under paragraph 19(b) of SIMA, the appellant requested that new information submitted during the appeal proceeding be considered. The Tribunal refused to consider the information and dismissed the appeal, as it found that both the manufacturer and exporter of the goods had been given ample opportunity to provide the information to the Deputy Minister to enable the calculation of a specific NV.⁵⁰

[52] The CBSA submitted that the facts of the present case are directly analogous to those in *Fletcher*. It submitted that “ample opportunity” to provide further information to enable the calculation of a specific NV was given to the Exporter and that the new information presented after the close of the NVR should not be considered. The CBSA added that, even if the new information was considered, it does not address the deficiencies identified during the NVR.

[53] The Tribunal notes that its decision in *Fletcher* was rendered more than three decades ago and that there have been many decisions since then that have stated that appeals before the Tribunal proceed *de novo* and are not reviews of prior decisions on the basis of the CBSA record.⁵¹ However, the Tribunal is also cognizant of the fact that information and supporting documentation provided by exporters may be verified by the CBSA through on-site verifications or desk audits.⁵² In this case, if the Tribunal were to remand the President’s decision back to the CBSA for reconsideration, it would essentially be asking the CBSA to do (and complete) what it had already attempted to do during the NVR.

[54] In any event, the Tribunal need not definitively settle the issue of the admissibility of the new information provided by Allyco, as it is of the view that even if it accepted to consider the information, it would still not be sufficient to enable the calculation of a specific NV for the goods in issue. As the CBSA noted, no information on domestic sales of like goods was provided and, while some information on costing was included, it was only for export sales and for three of the seven identified sales.⁵³ In addition—and more importantly—there is no narrative explanation provided, thus making it impossible to understand the information. In essence, the new information fails to address the deficiencies identified by the CBSA during the NVR.

⁴⁸ (19 March 1993), AP-90-023 and AP-90-127 (CITT) [*Fletcher*].

⁴⁹ Reinvestigations and NVRs are both administrative proceedings conducted to update NVs, export prices and amounts of subsidy. However, whereas reinvestigations are conducted in respect of all exporters of goods covered by a particular Tribunal finding, NVRs are conducted in respect of a single exporter.

⁵⁰ *Fletcher* at 5–6.

⁵¹ See, for example, *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*, 2010 FC 78 (CanLII) at para. 24; *Hyundai Canada Inc. v. President of the Canada Border Services Agency* (12 May 2022), EA-2019-008 and EA-2019-010 (CITT) at para. 48; *Robertson* at para. 71.

⁵² Exhibit EA-2021-004-05 at para. 50.

⁵³ *Ibid.* at para. 56.

[55] In light of the foregoing, the Tribunal finds that the NV applicable to the goods in issue is that determined in accordance with the ministerial specification made pursuant to subsection 29(1) of SIMA on the basis of an advance of 170% over the export price of the goods.

[56] The Tribunal is not unsympathetic to the fact that some exporters, particularly those that are self-represented, may have difficulty communicating with the CBSA and understanding its procedures relating to the conduct of NVRs or reinvestigations. Nothing would prevent Allyco from importing a small amount of fether drive screws or spikes, pay the applicable AD and CV duties and then request a re-determination under subsection 56(1.01) of SIMA. The Exporter would then be given a new opportunity to provide the CBSA with the information that it previously failed to provide and therefore enable the calculation of a specific NV that could be applied to future importations.

DECISION

[57] The appeal is dismissed.

Randolph W. Heggart

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Presiding Member