Federal Court of Appeal | Cour d'appel fédérale

Date: 20170809

Docket: A-46-16

Citation: 2017 FCA 166

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

ESSAR STEEL ALGOMA INC.

Applicant

and

JINDAL STEEL AND POWER LIMITED, STEEL AUTHORITY OF INDIA LTD., HIGH COMMISSION OF INDIA, MINISTRY OF INDUSTRY AND TRADE OF THE RUSSIAN FEDERATION, MINISTRY OF ECONOMIC DEVELOPMENT OF THE RUSSIAN FEDERATION and SSAB CENTRAL INC.

Respondents

Heard at Ottawa, Ontario, on May 23, 2017.

Judgment delivered at Ottawa, Ontario, on August 9, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The applicant, Essar Steel Algoma Inc. (Essar Algoma), seeks judicial review of the Canadian International Trade Tribunal's (the CITT) Finding dated January 6, 2016 in Inquiry No. NQ-2015-001 pursuant to section 96.1 of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 (the SIMA). As part of its Statement of reasons (the reasons), issued January 20, 2016, in support of its Finding, the CITT found that hot-rolled carbon steel plate and high-strength low-alloy steel plate imports (the Subject Goods) dumped from the Russian Federation (Russia) and dumped and subsidized from the Republic of India (India) had not caused injury and were not threatening to cause injury to the domestic steel industry.

[2] For the reasons that follow, I would dismiss the application with costs.

II. Background

[3] On April 20, 2015, Essar Algoma and two other steel mills filed a complaint with the President of the Canada Border Services Agency (the CBSA), requesting a dumping and subsidy investigation into the Subject Goods, which the CBSA President initiated on June 10, 2015. The CBSA's decision to initiate dumping and subsidy investigations triggered a preliminary inquiry by the CITT under subsection 34(2) of the SIMA. On June 11, 2015, the CITT undertook a preliminary injury and threat of injuring inquiry and on August 10, 2015, it found sufficient evidence to proceed with a full inquiry into whether the dumping and subsidizing had caused injury or threatened to cause injury to the domestic industry.

[4] On September 8, 2015, the CBSA made preliminary findings of dumping and subsidizing. It accordingly imposed provisional anti-dumping measures and countervailing duties on the Subject Goods. The next day, on September 9, 2015, the CITT initiated a notice of commencement of inquiry.

[5] On December 7, 2015, the CBSA made a final determination of dumping in respect of the Subject Goods from both Russia and India, and a final determination of subsidizing in respect of the Subject Goods from India. It estimated that 100 percent of the Subject Goods released into Canada between January 1, 2014 and March 31, 2015 were dumped. The CBSA further found the subsidy relating to the Subject Goods from Russia was minimal (0.2 percent) whereas the Subject Goods from India were subsidized at 20.3 percent of the export price. Finally, the CBSA considered the subsidy in respect of the Subject Goods from India to be "significant".

III. The CITT's decision

[6] The CITT held that while the Subject Goods might negatively affect the domestic industry, they neither caused nor threatened to cause injury in the present case. In reaching its conclusion, the CITT conducted a six-step inquiry determining: 1) what constitutes "Like Goods" pursuant to subsection 2(1) of the SIMA (i.e. domestic goods that are identical in all respects to the Subject Goods, or goods the uses and other characteristics of which closely resemble those of the Subject Goods); 2) the scope of the "domestic industry"; 3) whether it should assess the dumping's effect on a cumulative basis (*i.e.* considering both Russian and Indian Subject Goods together); 4) whether cross-cumulation is appropriate (*i.e.* considering the effects of dumping and subsidization together); 5) whether the dumping/subsidization caused

injury to the domestic industry; and 6) absent injury, whether a threat of injury to the domestic industry exists.

[7] In identifying the Like Goods of domestic producers in relation to the Subject Goods pursuant to subsection 2(1) of the SIMA, the CITT included hot-rolled steel plate produced by steel mills and smaller entities known as service centers. For the purpose of this appeal, it suffices to mention that steel mills – such as Essar Algoma – commonly produce large steel plate sheets measuring 96 inches in width or greater (Discrete Plate). They also produce plates from steel coils that are then cut to length (Cut-to-Length Plate). As for service centers, they do not produce Discrete Plate, working mainly with Cut-to-Length Plate and mainly in widths of 72 inches and narrower. Some service centers also import Discrete Plate (CITT's reasons at para. 52). Despite the difference in width of hot-rolled steel plate produced by the steel mills and the service centers, the CITT was satisfied that "the domestic industry, as a whole, produces the same range of hot-rolled steel plate products as the subject goods" and that both Discrete Plate and Cut-to-Length Plate are comprised in "a single class of goods" (CITT's reasons at paras. 35, 38, 44 and 45). The CITT concluded that both steel mills and service centers were producers of Like Goods.

[8] In addressing the issue of which domestic producers should be included in the domestic industry, the CITT turned to the "domestic industry" definition as set forth in subsection 2(1) of the SIMA.

[9] In this regard, Essar Algoma acknowledged before the CITT, that service centers generally form part of the domestic industry, but urged the CITT to exclude three of them from the injury analysis, namely: Samuel, Son & Co., Limited (Samuel), Varsteel Ltd. (Varsteel) and Russel Metals. Specifically, Essar Algoma claimed that Samuel and Varsteel imported Subject Goods in substantial volumes, injuring domestic steel mills. As for Russel Metals, Essar Algoma argued that it should be excluded due to its relation to Acier Wirth Steel (Wirth), a company that imports the Subject Goods.

[10] In deciding whether to exclude the three service centers from the analysis, the CITT applied the structural/behavioural analysis. It thus examined each of the service centers in light of the "structural" factors (*e.g.* the ratio of the service center's sales of the Subject Goods to its total sales in the domestic market) and the "behavioural" factors (*e.g.* whether the service center imported the Subject Goods as a defensive measure against other Subject Goods or as an aggressive measure to capture market share). From the outset, the CITT observed that it retains discretion to include any producer as part of the domestic industry, irrespective of the outcome on the structural/behavioural analysis (CITT's reasons at paras. 56-58). After putting each of the three impugned service centers (Samuel, Varsteel and Russel Metals) through the structural/behavioural analysis, the CITT ultimately declined Essar Algoma's request. It found that all three service centers were properly included within the domestic industry for the purposes of the inquiry (CITT's reasons at paras. 59-68).

[11] Turning to the issue of cumulation, the CITT assessed the effects of the dumped goods from Russia and from India on a cumulative basis. In so doing, the CITT noted that subsection

42(3) of the SIMA directs it to consider dumping cumulatively if (i) the margin of dumping from each country "is not insignificant" and the volume of the goods from each country "is not negligible" and, (ii) cumulation is appropriate taking into account the conditions of competition between the Subject Goods and the Like Goods of domestic producers or between Subject Goods and goods imported into Canada from different countries under investigation. The CITT found that the margins of dumping were "not insignificant" as they exceed 2 percent. It also found that the volume of the Subject Goods from both Russia and India was "not negligible". With respect to the conditions of competition, the CITT found that the Like Goods at issues are sold through the same or similar distribution channels as the Subject Goods, and that these commodity products compete in the Canadian marketplace (CITT's reasons at paras. 83-92).

[12] The CITT observed that the SIMA is silent on cross-cumulation. In considering whether cross-cumulation was appropriate, the CITT remained mindful of the leading World Trade Organization Appellate Body (the WTO Appellate Body) report addressing cross-cumulation (*United States - Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products From India* (8 December 2014), WTO Doc. WT/DS436/AB/R). In that case, the WTO Appellate Body found it inappropriate to cross-cumulate the effects of dumping from one country and subsidization by another. The CITT deemed the present case to be distinguishable in this respect given that the Subject Goods at issue are dumped from two countries, creating an analytical link, but only subsidized in one of them. Concerned about falling out of line with the WTO Appellate Body's ruling, the CITT decided to perform its analysis on a cross-cumulated basis in the present case but added that, if necessary, it could consider whether the Indian subsidizing effects ought to be segregated from those caused by dumping (CITT's reasons at paras. 88-92).

[13] In conducting its injury analysis, the CITT then turned to the criteria set out at subsection 37.1(1) of the *Special Import Measures Regulations*, S.O.R./84-927 (the SIMR): 1) the import volume of dumped or subsidized goods; 2) the price effect of dumped or subsidized goods, including price undercutting, depression and suppression; and 3) the resulting impact of the dumped or subsidized goods on the domestic industry, including economic factors (*e.g.* decline in output, sales, market share, profits, productivity, return on investments or the use of industrial capacity). The CITT analyzed each criterion in detail, referring to various documents and viva voce evidence. It found the Subject Goods adversely affected the domestic industry. The impact was nevertheless principally limited to steel mills, and Essar Algoma specifically, rather than the domestic industry as a whole. The CITT also determined that other factors were responsible for some of the injury, including poor market conditions and a raw material shortage for Essar Algoma caused by a dispute with a supplier. As a result, the CITT concluded that the Subject Goods did not cause material injury to the domestic industry.

[14] Finally, having found no injury, the CITT queried whether the Subject Goods threatened future injury. It established a 12-18-month-threat assessment window and found both: 1) a likelihood that import of Subject Goods would substantially increase; and 2) that the Subject Goods could undercut domestic prices (CITT's reasons at paras. 183-206). The CITT nonetheless concluded, as in the injury analysis, that although some producers (especially Essar Algoma) might be threatened with injury, it could not extrapolate from that conclusion a threat to the domestic industry as a whole. Again, significant factors unrelated to the Subject Goods were at play, and it was primarily Essar Algoma that stood to sustain injury.

IV. Issues and Standard of Review

[15] This Court has previously observed that the CITT is a highly specialized tribunal and that as such, its decisions are entitled to deference and will be reviewed on the reasonableness standard (*MAAX Bath Inc. v. Almag Aluminum Inc.*, 2010 FCA 62, [2010] F.C.J. No. 275 (QL) at paras. 31-33; *Rio Tinto Alcan Inc. v. Québec Silicon Limited Partnership (QSLP)*, 2015 FCA 72, [2015] F.C.J. No. 1559 (QL) at para. 35). In this appeal, the role of our Court is therefore not to re-weigh the evidence that was before the CITT but to determine whether the CITT's decision falls within a range of possible and acceptable outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[16] Essar Algoma's judicial review application gives rise to two issues stemming from the CITT's analysis:

(1) Was the CITT analysis regarding the domestic industry reasonable?

(2) Was the CITT analysis regarding injury and threat of injury reasonable?

V. Analysis

A. *Review of the CITT's analysis regarding the domestic industry*

[17] Essar Algoma challenges the CITT's interpretation of the "domestic industry" as defined at subsection 2(1) of SIMA. Specifically, Essar Algoma submits that the CITT erred in law when it assessed injury or threat of injury only in view of the domestic industry as a whole without

further inquiring as to whether a "major proportion" of the "domestic industry" faced injury or threat of injury. The SIMA defines "domestic industry" at subsection 2(1) as follows:

domestic industry means, other than for the purposes of section 31 and subject to subsection (1.1), the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, **domestic industry** may be interpreted as meaning the rest of those domestic producers; (*branche de production nationale*)	*branche de production nationale* Sauf pour l'application de l'article 31 et sous réserve du paragraphe (1.1), l'ensemble des producteurs nationaux de marchandises similaires ou les producteurs nationaux dont la production totale de marchandises similaires constitue une proportion majeure de la production collective nationale des marchandises similaires. Peut toutefois en être exclu le producteur national qui est lié à un exportateur ou à un importateur de marchandises sous-évaluées ou subventionnées, ou qui est lui-même un importateur de telles marchandises. *(domestic industry)*
[Underlined added. Bold in the original]	[Mon soulignement.]

[18] Essar Algoma contends that the CITT should not have ended its analysis upon concluding that the dumping did not injure or threaten injury to the "domestic industry" as a whole. It affirms that following its analysis on the domestic industry as a whole, the CITT should have then moved to consider whether a "major proportion" of the domestic industry was injured or threatened in the circumstances. According to Essar Algoma, the term "or" ("ou" in French) used in subsection 2(1) of the SIMA between "domestic producers as a whole" and "those domestic producers whose collective production of the Like Goods constitutes a major proportion of the total domestic production" must be interpreted as being conjunctive rather than disjunctive. Essar

Algoma argues that its contention in this regard is supported by the provision's plain meaning, the SIMA's overall purpose and this Court's jurisprudence.

[19] In my opinion, Essar Algoma's contention fails. Essar Algoma has not demonstrated that the CITT's interpretation of the "domestic industry" as defined at subsection 2(1) of the SIMA is unreasonable.

[20] Essar Algoma argues that its position is supported by the provision's plain meaning without explaining how this is so. Since the term "or" can be read conjunctively or disjunctively depending on the context, Essar Algoma's contention that the analysis should end here is unpersuasive. Essar Algoma also argues that the CITT's disjunctive reading of the domestic industry definition is inconsistent with the SIMA's purpose given that the SIMA is a remedial legislation and requires a broad reading pursuant to section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21. But again, Essar Algoma's argument fails to persuade. Logically, given that Parliament provided a two-part definition for domestic industry at subsection 2(1) of the SIMA - *i.e.* "as a whole" or "major proportion" - it cannot follow that Parliament would direct the CITT to consider injury to the domestic industry as a whole if, to fulfill the SIMA's purpose, the CITT must act even when only a major proportion suffers injury. Why would the CITT even examine the industry as a whole if it was sufficient to show harm to a major proportion of the domestic industry? Although it is true that remedial legislation must receive a large and liberal interpretation, that interpretation cannot come at the cost of rendering statutory language superfluous.

[21] In support of its challenge to the CITT's interpretation of the "domestic industry", Essar Algoma also draws from the decisions in *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)* (F.C.A.), 32 D.L.R. (4th) 222, [1986] F.C.J. No. 652 (QL) [*Japan Electrical*]; and *Brunswick International (Canada) Ltd. v. Canada (Anti-Dumping Tribunal)*, 108 D.L.R. (3d) 216, [1979] F.C.J. No. 1114 (QL) [*Brunswick*]. Yet, both of these decisions are distinguishable.

[22] Indeed, in *Japan Electrical*, the Anti-dumping Tribunal - *i.e.* the CITT prior to its name change - chose from the outset to apply the major proportion definition. It thus seems that the Tribunal never turned its mind to whether the domestic industry as a whole would suffer injury. Unlike *Japan Electrical*, the CITT in the present matter elected to assess injury and threat of injury based on the domestic industry as a whole.

[23] Likewise in *Brunswick*, the Anti-dumping Tribunal decided from the start to assess injury based on a subset of the domestic industry, excluding from the inquiry producers accounting for 30% of domestic production. As it already chose the major proportion standard, it was thus open to the Anti-dumping Tribunal to determine that one producer, standing alone, represented a major proportion. Again, and in contrast, the CITT chose in this case to assess the domestic industry as a whole.

[24] The wording of subsection 2(1) of the SIMA leaves it open, depending on the circumstances, to consider "domestic producers" as a whole or a "major proportion" thereof for purposes of making a determination regarding the domestic industry. The interpretation adopted

by the CITT in the present case, on the basis of the record before it, is therefore reasonable in my view.

[25] There are two further factors that convince me that the CITT's interpretation of the domestic industry definition was reasonable. First, this interpretation is consistent with the CITT's determinations in seven previous cases dealing with hot-rolled steel plate (Inquiry No.: NQ-92-007, [1993] C.I.T.T. No. 70 (QL), 5 T.T.R. (2d) 272 [*Plate I*]; Inquiry No.: NQ-93-004, [1994] C.I.T.T. No. 104 (QL) [*Plate II*]; Inquiry No.: NQ-97-001, [1997] C.I.T.T. No. 114 (QL) at paras. 59-60 [*Plate III*]; Inquiry No.: NQ-99-004, [2000] C.I.T.T. No. 47 (QL) at paras. 104-106 [*Plate IV*]; Inquiry No.: NQ-2003-002, [2004] C.I.T.T. No. 2 (QL), 8 T.T.R. (2d) 483 at paras. 47-48 [*Plate V*]; Inquiry No.: NQ-2009-003, [2010] C.I.T.T. No. 10 (QL), 14 T.T.R. (2d) 260 at paras. 67-70 [*Plate VI*]; Inquiry No.: NQ-2013-005, [2014] C.I.T.T. No. 64 (QL), 18 T.T.R. (2d) 641 at paras. 49-54 [*Plate VII*]). In each one of these decisions, the CITT chose, on the facts of each case, to examine either the domestic industry as a whole or some subset of the industry making up a major proportion, but never both. When queried at the hearing, Essar Algoma could not direct this Court to an authority supporting its interpretation over the one the CITT appears to have consistently applied in the past.

[26] Second, the CITT's reading is also reasonable in light of our international commitments. The definition of "domestic industry" set forth in subsection 2(1) of the SIMA is derived from Part I, article 4.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) as observed by counsel for the appellant in oral submissions before our Court. The CITT recognized, at paragraph 70 of its reasons, that

articles 3.1 of the *Anti-dumping Agreement* and 15.1 of *the Agreement on Subsidies and Countervailing Measures* require the CITT to objectively assess the injury that is caused to the domestic industry by the dumping and subsidizing. In reference to article 3.1 of the Anti-Dumping Agreement, the CITT noted that the "requirement to conduct an objective assessment across the entire domestic industry is a key obligation for Canada".

[27] I also note that the WTO Appellate Body's report in *WTO – United States – Anti-Dumping Measures on Certain Hot-rolled Steel Products From Japan* (24 July 2001), WTO Doc. WT/DS184/AB/R, explained that article 3.1 of the Anti-Dumping Agreement requires a national investigating authority to consider the whole domestic industry wherever possible, and if not, to explain why. In the words of the WTO Appellate Body:

> 204. … Article 3.1 of the Anti-Dumping Agreement requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.
>
> [Emphasis added.]

[28] While it may have been preferable for the CITT in the present case to provide a more explicit rationale analysis for interpreting the "domestic industry" definition as disjunctive rather than conjunctive, and hence limiting its determination to the industry as a whole without turning to the "major proportion" thereof, I am satisfied that, in light of the foregoing, the CITT's analysis regarding the domestic industry is nonetheless reasonable.

[29] Also, in making its determination on the Like Goods as they correlate with domestic producers, the CITT carefully considered the evidence. The CITT's conclusion to include service centers within the domestic industry is based on the Subject Goods as defined in the CBSA President's preliminary dumping determination (Applicant's Record, Vol. 1, Tab 10 at p. 195; CITT's reasons at para. 17), which itself is based on Essar Algoma's description in its complaint (Applicant's Record, Vol. 1, Tab 10 at p. 190). In deciding that the steel mills and the service centers were producers of the Like Goods, the CITT found the following at paragraphs 34 to 38 of its reasons (see also: Respondents' Memorandum of Fact and Law at para. 29):

- Domestic mills, like Essar Algoma, produce discrete plate in widths of 96 inches up to 152 inches. For their part, the service centers produce cut-to-length plate and concentrate their activities on plate between 24 and 72 inches (CITT's reasons at para. 34);
- While imports of the subject goods were found to be mostly in widths of 96 inches and wider, they were also found to be occasionally imported in widths of 72 inches and narrower. Service centers focus on the production of plate measuring 72 inches and narrower but some service centers have the capacity of producing plate in widths of 96 inches and thus both steel mills and service centers are producers of Like Goods (CITT's reasons at para. 35);
- Both the steel mills and the service centers use essentially the same manufacturing process as used in the production of Subject Goods (CITT's reasons at para. 36);
- In terms of market characteristics, the domestically produced goods and the Subject Goods generally fulfil the same customer needs, compete directly with each other and rely on the same channels of distribution (CITT's reasons at para. 37);

- Although the service centers may tend to concentrate on narrower widths and steel mills tend to concentrate on wider widths, both produce a full range of Like Goods that compete with the Subject Goods of the same description and can thus be considered a single industry (CITT's reasons at para. 38).

[30] It is also noteworthy that the CITT's conclusion to include service centers as part of the domestic industry is consistent with other recent decisions rendered by the CITT (*Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (30 January 2015), RR-2014-002 (CITT's reasons at para. 30); *Hot-rolled Carbon Steel Plate* (20 May 2014), NQ-2013-005 (CITT's reasons at para. 53). Furthermore, it was open to Essar Algoma to oppose the inclusion of the service centers within the domestic industry but it chose not to:

> The Tribunal finds that service centres are an increasingly important part of the domestic industry. The evidence is unequivocal that, although they tend to use different production processes and have different business models than the domestic mills, service centres produce goods falling within the definition of the subject goods. As in previous plate cases, the Tribunal finds it appropriate to continue to include service centres within the scope of the domestic industry. This has not been disputed by Essar Algoma. [Emphasis added.]
>
> (CITT's reasons at para. 51)

[31] It follows that the CITT's inclusion of the service centers as part of the domestic industry is reasonable.

[32] I also find no error in the CITT's conclusion to include Samuel, Varsteel and Russel Metals in the domestic industry. In this regard, Essar Algoma argues that the CITT abandoned its structural/behavioural analysis in favour of a more onerous standard, namely whether the service centers at issue were "first and foremost conduits for the importation of subject goods." The CITT's decision to include the service centers does not render its conclusion unreasonable.

While the structural/behavioural analysis provides the CITT with factors to consider, it does not set a threshold for exclusion. It is therefore inaccurate to characterize the CITT's so-called "first and foremost" determination as inconsistent with the structural/behavioural factors. Rather, the CITT espoused a standard against which it could apply the structural/behavioural factors to determine whether the service centers at issue ought to be excluded and to do so did not constitute an error (CITT's reasons at paras. 56-58). In short, Essar Algoma has failed to persuade this Court that it should intervene.

B. *Review of the CITT's analysis regarding the injury and threat of injury analyses*

[33] Essar Algoma did not insist on its challenge to the injury and threat of injury analyses in its oral submissions but asserts in its Memorandum of Fact and Law that the CITT committed a number of reviewable errors (Applicant's Memorandum of Fact and Law at paras. 104-128). Be that as it may, upon reviewing the CITT's consideration and examination of the evidence, I am of the view that its analysis in this regard is justified, intelligible and transparent and its ultimate decision falls within the range of reasonable and possible outcomes.

VI. Conclusion

[34] I would dismiss the application for judicial review with costs in the amount of $8,500 inclusive of disbursements and taxes.

"Richard Boivin"

J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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