

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180327

Docket: A-141-16

Citation: 2018 FCA 63

**CORAM: WEBB J.A.
BOIVIN J.A.
GLEASON J.A.**

BETWEEN:

ARCELORMITTAL DOFASCO G.P.

Applicant

and

**ESSAR STEEL ALGOMA INC., EVRAZ INC. NA CANADA,
UNITED STATES STEEL CANADA INC.,
JSW STEEL LTD., HIGH COMMISSION OF INDIA and
THE ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on October 31, 2017.

Judgment delivered at Ottawa, Ontario, on March 27, 2018.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**BOIVIN J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an application under paragraph 96.1(1)(d.1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA) to review and set aside a determination of the President of the Canada Border Services Agency (the President) made under paragraph 76.03(7)(a) of that Act. The President, in her decision, determined that “the expiry of the order made by the Canadian

International Trade Tribunal on August 15, 2011 in Inquiry No. RR-2010-001 ... is unlikely to result in the continuation or resumption of dumping of certain hot-rolled steel sheet originating in or exported from Chinese Taipei and the Republic of India ...”. The President also made determinations with respect to other countries but Arcelormittal Dofasco G. P. (Dofasco) has applied to this Court only with respect to the determinations in relation to the hot-rolled steel sheet of Chinese Taipei and the Republic of India (India).

[2] For the reasons that follow I would dismiss this application.

I. Background

[3] In 2001, a final determination of dumping of hot-rolled steel sheet and a finding that the dumping had caused injury was made in relation to a number of countries including Chinese Taipei and India. As a result, anti-dumping duties were imposed. Under SIMA when anti-dumping duties are imposed those duties will expire unless a review is undertaken within five years from the date of the order or finding of the Canadian International Trade Tribunal (the Tribunal) that resulted in the imposition of the anti-dumping duties, and the result of that review is that the duties should continue. In 2006, the first expiry review process was completed and the duties continued to be imposed in relation to Chinese Taipei and India as well as certain other countries. In 2011, the second expiry review was conducted and again the duties continued to apply with respect to Chinese Taipei and India and certain other countries. The third expiry review, which is the subject of this proceeding, was commenced on December 8, 2015 by the Tribunal.

[4] This expiry review was initiated under subsection 76.03(3) of SIMA. Subsection 76.03(7) of SIMA, at the time that the review was conducted in this case, provided that:

(7) If the Tribunal decides to initiate an expiry review, the President shall

(a) within one hundred and twenty days after receiving notice under subparagraph (6)(a)(i), determine whether the expiry of the order or finding in respect of goods of a country or countries is likely to result in the continuation or resumption of dumping or subsidizing of the goods; and

(b) provide the Tribunal with notice of the determination without delay after making it.

(7) Lorsque le Tribunal décide de procéder au réexamen relatif à l'expiration, le président :

a) dans les cent vingt jours de la réception de l'avis prévu à l'alinéa (6)a), décide si l'expiration de l'ordonnance ou des conclusions concernant les marchandises d'un ou de plusieurs pays causera vraisemblablement la poursuite ou la reprise du dumping ou du subventionnement des marchandises;

b) avise sans délai le Tribunal de sa décision.

[5] If the President makes a determination that the expiry of the order will likely result in a continuation or resumption of dumping or subsidizing, the Tribunal will then make a determination of whether the expiry of the order is likely to result in injury or retardation (subs. 76.03(10) of SIMA). If the determination of the President is that the expiry of the order is unlikely to result in a continuation or resumption of dumping or subsidizing, then that is the end of the matter and the anti-dumping duties will no longer apply.

[6] The President conducted the review required by subsection 76.03(7) of SIMA and made the determination as noted above with respect to the hot-rolled steel sheet of Chinese Taipei and India on April 6, 2016. The reasons for the decision were released on April 21, 2016.

[7] As part of the review process, the President sent expiry review questionnaires to Canadian producers and also to importers and exporters. However, no exporter from Chinese Taipei provided a response to this questionnaire and only one exporter from India provided a limited response to the questionnaire. The conclusion of the President with respect to the likelihood of the continuation or resumption of dumping of hot-rolled steel sheet originating in or exported from Chinese Taipei and India was based on the information that was otherwise available to the President.

[8] Dofasco's complaint with respect to the President's determination for Chinese Taipei relates to:

- (a) the use by the President of certain pricing information for hot-rolled steel sheet;
- (b) the finding that exporters from Chinese Taipei continued to export hot-rolled steel sheet to countries that have imposed anti-dumping measures; and
- (c) the reference by the President to a projected increase in demand for steel in China without taking into account the low prices forecasted for hot-rolled steel sheet in the Chinese market.

[9] The complaint of Dofasco with respect to India is that the President did not take into account a recent finding by the President related to a similar product (hot-rolled carbon steel plate – the Plate VIII Finding made on December 7, 2015 (with reasons dated December 22, 2015) in CBSA files 4214-45 AD/1406 and 4218-42 CVD/141). In the Plate VIII Finding, the

President made a final determination of dumping and subsidizing of hot-rolled carbon steel plate originating in or exported from India into Canada.

II. Standard of Review

[10] The standard of review for the determination of the President is reasonableness (*Prudential Steel ULC and Algoma Tubes Inc. v. Boly Pipe Co., Ltd., et al.*, 2016 FCA 137, 484 N.R. 42 at para. 4).

III. Issue

[11] The issue in this case is whether the determinations of the President with respect to hot-rolled steel sheet originating in or exported from Chinese Taipei and India were reasonable.

IV. Analysis

[12] As Dofasco has raised different questions in relation to the finding with respect to Chinese Taipei and India, the arguments raised by Dofasco will be addressed separately for each country.

A. *Chinese Taipei*

[13] As noted above, no exporter from Chinese Taipei completed the questionnaire that was circulated by the President. Therefore, the President did not have any information from these exporters to assist her in determining the price at which hot-rolled steel sheet from Chinese

Taipei was being sold domestically or in export markets. However, the President reviewed an industry publication – the CRU Steel Sheet Products Market Outlook, January 2016. Dofasco acknowledged that the President did not have any pricing information from the exporters located in Chinese Taipei and did not submit that, other than the CRU Report, there was any way that the President could have determined these prices based on the information that was available to the President in the limited amount of time to complete the review required by subsection 76.03(7) of SIMA. The complaint of Dofasco is that the President used the pricing information in this publication for the East and Southeast Asian region. The submission is that the President “mistakenly assumed that Chinese Taipei was part of the ‘East and Southeast Asia Region’ as defined by CRU”.

[14] The CRU publication was submitted at the hearing of this application. This publication includes a table which indicates the steel sheet prices for 2012 to 2020. In this table the only areas identified for hot-rolled coil are:

- USA Midwest,
- Germany,
- EU, export,
- Asia,
- China,
- CIS, export,
- Brazil, export, and
- India.

The footnote reference for Asia is “cfr East and South East Asian Port”. The footnote reference for China is “ex-Shanghai warehouse inclusive of 17% sales tax”. Therefore, it was reasonable for the President to assume that the pricing information for hot-rolled steel sheet for Chinese Taipei was included in the pricing information for Asia.

[15] In any event, even if the pricing information for hot-rolled steel sheet for Chinese Taipei is included in the pricing information for China (which based on the list of regions is the only other possibility), this would not have had a significant impact on the pricing information that was used. The pricing for hot-rolled steel sheet of China and Asia for 2016 and 2017 as listed indicated that the prices in China for each year would be 1.2% and 1.3%, respectively, higher than the prices for Asia.

[16] Dofasco also argued that the President should not have considered that exporters from Chinese Taipei are continuing to sell hot-rolled steel sheet to other countries that have taken anti-dumping measures. The argument is that it is not clear what anti-dumping measures were in place in these other countries.

[17] The reference to exports to other countries with anti-dumping measures is found in paragraph 285 where the President stated that “[t]he presence of Indonesia and Thailand amongst the largest export destinations for hot-rolled steel sheet from Chinese Taipei is also noteworthy as each of those countries has anti-dumping measures against Chinese Taipei for hot-rolled steel sheet”.

[18] Dofasco submitted that it was not appropriate for the President to assume that the anti-dumping measures imposed by Indonesia and Thailand would be similar to those imposed by Canada. Dofasco referred to two possibilities in its memorandum – a normal value system (where goods sold at or above normal values are not subject to an anti-dumping duty) and a system where the anti-dumping duty is simply applied to the import price. However, in either system, it would appear that the price to the importer will be more than a dumped price.

[19] In this application Dofasco has not pointed to anything that would suggest that the anti-dumping regimes of Indonesia and Thailand are different from the regime in Canada. Its argument is only that the President appears to have assumed that anti-dumping measures in these countries would operate in a similar manner to the way in which the Canadian system works. This is not sufficient to warrant the intervention of this Court in this matter.

[20] Dofasco also argued that the President did not take into account that the prices for hot-rolled steel sheet in China were forecasted to be low and therefore Canada could be an attractive market to dump goods. However, the economic downturn in China was noted by the President in paragraph 276. The President also found, in paragraph 281, that exporters from Chinese Taipei reduced exports in 2015. The President stated, in paragraph 282, that the primary export markets for hot-rolled steel sheet from Chinese Taipei are the Asian markets and “those markets are projected by CRU to increase their consumption of hot-rolled steel sheet in each of the next two years”. The conclusion was that “the evidence does not indicate that exporters in Chinese Taipei will have to divert exports from their predominant export markets due to decreasing demand in those markets”.

[21] The President also stated, in relation to China, that:

283. With respect to China in particular, CRU actually forecasts China's demand for hot-rolled steel sheet to be slightly higher in 2016 than 2015 and continue to rise into 2017. China's production of hot-rolled steel sheet is projected to decrease slightly in 2016 and remain stable in 2017.

284. Consequently, the assertions from the Canadian producers that the Chinese domestic market will not be as attractive for exports of hot-rolled steel sheet from Chinese Taipei to China is not supported by recent forecasts on the administrative record.

[22] The pricing of hot-rolled steel sheet in China and its potential impact on exporters from Chinese Taipei is a matter that is within the expertise of the President and the President should be afforded deference in relation to this finding.

[23] There is no basis upon which to interfere with the determination of the President that it is unlikely that the expiry of the order will result in a continuation or resumption of dumping of hot-rolled steel sheet by Chinese Taipei.

B. *India*

[24] Dofasco's argument in relation to the finding with respect to India was that the President failed to take into account the Plate VIII Finding, which was a finding that another product (hot-rolled steel plate) from India was being dumped. The President referred to the Plate VIII finding in paragraph 151 in reciting the "Position of the Canadian Producers Regarding India". In the analysis for India (which is from paragraphs 305 to 335, inclusive), there is a discussion of the exports of hot-rolled steel plate from India in paragraphs 325 to 327, however, the Plate VIII Finding is not mentioned.

[25] Dofasco specifically referred to paragraph 37.2(1)(i) of the *Special Import Measures Regulations* (SOR/84-927) (the Regulations), which provides, in part, that:

37.2(1) In making a determination under paragraph 76.03(7)(a) of the Act, the President may consider

...

(i) the imposition of anti-dumping or countervailing measures by authorities of Canada in respect of similar goods while an order or finding in respect of the goods was in effect; ...

(emphasis added)

37.2(1) Pour prendre la décision visée à l’alinéa 76.03(7)a) de la Loi, le président peut prendre en compte les facteurs suivants :

[...]

i) l’assujettissement par le Canada de marchandises semblables à des mesures antidumping ou compensatoires alors que les marchandises faisaient l’objet d’une ordonnance ou de conclusions;

(soulignement ajouté)

[26] It should first be noted that the opening part of subsection 37.2(1) of the Regulations is permissive and provides that the President “may” consider – the President is not obligated to consider these factors.

[27] In any event, the factor listed in paragraph (i) is the imposition of any anti-dumping measures. With respect to the Plate VIII Finding, while the President had made a final determination of dumping and subsidizing of certain hot-rolled steel plate originating in or exported from India, the Tribunal found on January 6, 2016 (with reasons dated January 20, 2016) that the dumping and subsidizing of these goods “have not caused injury and are not threatening to cause injury to the domestic industry” (Finding of the Tribunal in Inquiry No. NQ -2015-001). As a result no anti-dumping duties were put in place and therefore no anti-

dumping measures were put in place. This finding of the Tribunal was made before the finding that is under review in this case.

[28] The factor listed in paragraph 37.2(1)(i) of the Regulations is “the imposition of anti-dumping ... measures by authorities of Canada”. No anti-dumping measures were imposed by authorities of Canada in relation to the hot-rolled steel plate of India. Therefore, the Plate VIII Finding (which did not result in the imposition of any anti-dumping measures) would not be a factor as described in paragraph 37.2(1)(i) of the Regulations.

[29] It is clear, however, that the Plate VIII Finding was raised by Dofasco before the President and it was an important argument for Dofasco. As well, the Plate VIII Finding related to dumping (and not injury), and the issue before the President in this case was the likelihood of dumping. Therefore, it would have been preferable for the President, in this case, to specifically address the Plate VIII Finding in her analysis. This does not, however, make her determination in relation to hot-rolled steel sheet from India unreasonable because the President is presumed to have considered all of the evidence (*Simpson v. Attorney General of Canada*, 2012 FCA 82, at para. 10) and it is not necessary for the President to refer to each and every matter that was taken into account (*Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, 98 O.R. (3d) 210 at para. 29; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16).

[30] In paragraphs 305 to 335 the President discusses a number of different reasons for her determination with respect to India. In my view, her failure to specifically address the Plate VIII Finding does not render her determination, which is the subject of this application, unreasonable.

V. Conclusion

[31] As a result I would dismiss this application with costs.

"Wyman W. Webb"

J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPLICATION FOR JUDICIAL REVIEW MADE IN RESPECT OF THE PRESIDENT
OF THE CANADA BORDER SERVICES AGENCY'S DETERMINATION IN EXPIRY
REVIEW NO. RR-2015-002**

DOCKET: A-141-16

STYLE OF CAUSE: ARCELORMITTAL DOFASCO
G.P. v. ESSAR STEEL ALGOMA
INC et al.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 31, 2017

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

DATED: MARCH 27, 2018

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