Federal Court of Appeal | Cour d'appel fédérale

Date: 20180605

Dockets: A-403-16
A-400-16

Citation: 2018 FCA 111

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

BETWEEN:

JFE STEEL CORPORATION, NIPPON STEEL & SUMITOMO METAL CORPORATION, SUMITOMO CORPORATION, SUMITOMO CANADA LTD., and METAL ONE CORPORATION

Applicants

and

EVRAZ INC. NA CANADA, CANADIAN NATIONAL STEEL CORPORATION, CANTAK CORPORATION, EDGEN MURRAY CORPORATION, GATEWAY TUBULARS LTD., MARUBENI-ITOCHU STEEL INC., MARUBENI-ITOCHU TUBULARS CANADA, SHELL CANADA LTD., and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on January 30, 2018.

Judgment delivered at Ottawa, Ontario, on June 5, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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PUBLIC VERSION OF REASONS FOR JUDGMENT

WEBB J.A.

[1] JFE Steel Corporation (JFE) brought an application for judicial review (A-400-16) under paragraph 96.1(1)(*a*) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), in relation to the final determinations of dumping made by the President (President) of the Canada

Border Services Agency (CBSA) with respect to certain welded large diameter carbon and alloy steel line pipe (LDLP) originating in or exported from the People's Republic of China (China) and Japan dated September 20, 2016 (Case number LLP 2016 IN) (the Final Determination). Nippon Steel & Sumitomo Metal Corporation (Nippon Steel), Sumitomo Corporation (Sumitomo), Sumitomo Canada Ltd., and Metal One Corporation (Metal One) also brought an application for judicial review (A-403-16) of the Final Determination. The reasons for the Final Determination were released on October 5, 2016.

[2] By an Order of this Court dated January 31, 2017, these applications were consolidated with all future filings to be in A-403-16 alone. These reasons shall be filed in A-403-16 and a copy thereof shall also be filed in A-400-16.

[3] These applications only relate to the finding made with respect to LDLP originating in or exported from Japan.

[4] For the reasons that follow, I would dismiss these applications.

I. Background

[5] SIMA is the statute that provides for the imposition of anti-dumping and countervailing duties when goods are dumped into Canada. SIMA was amended in 2017 and the references herein to the various sections of SIMA will be to those provisions as they read when the Final Determination was made.

[6] Goods imported into Canada are “dumped” (as defined in subsection 2(1) of SIMA) when the normal value of the goods exceeds the export price of such goods. The margin of dumping is defined in subsection 2(1) of SIMA as the difference between these two amounts. The normal value is determined in accordance with the provisions of sections 15 to 23.1 and 30 of SIMA and the export price is determined in accordance with the provisions of sections 24 to 28 and 30 of SIMA. If the normal value or export price cannot be determined in accordance with these provisions, then such amount is determined in the manner specified by the Minister of Public Safety and Emergency Preparedness (section 29 of SIMA).

[7] An investigation with respect to the possible dumping of goods is initiated under subsection 31(1) of SIMA by the President either on the President’s own initiative or following a complaint that satisfies the requirements of subsection 31(2) of SIMA. In general there are two stages of a dumping investigation – preliminary and final– with a separation of responsibilities at each stage. The President is responsible for the preliminary determination of the margin of dumping and the goods to which these apply (section 38 of SIMA) and the final determination that goods have been dumped and that the margin of dumping is not insignificant (section 41 of SIMA). The Canadian International Trade Tribunal (CITT) is responsible for making an inquiry and a preliminary determination of whether the dumping has caused injury or is threatening to cause injury (sections 37.1 and 42 of SIMA) and for making any applicable order or finding as provided in section 43 of SIMA following a final determination made by the President of the CBSA. Anti-dumping duties are imposed under sections 3 to 5 of SIMA as a result of an order or finding by the CITT. The Final Determination made by the President of the CBSA, in and of itself, does not result in the imposition of anti-dumping duties.

[8] The margin of dumping for the purposes of the preliminary and the final determinations of dumping in relation to goods of a particular country (section 30.1 of SIMA) is the weighted average of the amounts as determined for each exporter in accordance with the provisions of section 30.2 of SIMA. If it is impractical to determine the margin of dumping for all goods under consideration, the margin may be determined based on a sample as provided in section 30.3 of SIMA.

[9] SIMA sets out strict time limits within which the amounts must be determined by the President. Under subsection 38(1) of SIMA, the President must make a preliminary determination of dumping between the sixtieth and the ninetieth day after the initiation of an investigation under section 31 of SIMA (unless the President extends the time by 45 days as provided in subsection 39(1) of SIMA for the reasons as set out in that subsection). Within 90 days of making the preliminary determination of dumping under subsection 38(1) of SIMA, the President must make the final determination of dumping under section 41 of SIMA. Since the President has strict deadlines to meet, the President must be given considerable discretion to determine how best to obtain the necessary information within these relatively short time limits.

[10] The normal value of goods is to be determined based on the price of like goods that are sold to the persons and in the circumstances as set out in section 15 of SIMA. If there are insufficient qualifying sales of like goods, the normal value, subject to section 20 of SIMA, is determined either by using the price at which like goods are sold to other countries or by using the cost of production and adding a reasonable amount for administrative, selling and all other costs and a reasonable amount for profits (section 19 of SIMA).

[11] JFE and Nippon Steel are producers or manufacturers of various steel products, including LDLP. Sumitomo, Metal One and Marubeni Itochu Steel Inc. (Marubeni Steel) are each trading companies operating in Japan. The President of the CBSA determined that, for the purposes of SIMA, the trading companies were the exporters of LDLP and not JFE and Nippon Steel. In calculating the normal values, the President of the CBSA used certain cost and profit amounts for the trading companies, JFE and Nippon Steel.

[12] In paragraph 23 of its memorandum filed in this application for judicial review, Nippon Steel indicated that its application (which was filed on behalf of itself and Sumitomo, Sumitomo Canada Ltd., and Metal One) was being brought to "challenge the President's decision in the FD [Final Determination] relating to: (1) the identification of the SIMA Exporters; (2) the calculation of normal values under paragraph 19(b) of the SIMA, and; (3) the prospective ADD [anti-dumping duty] assessment regime established by the President". JFE also raised the issue of the identification of the SIMA exporters and the calculation of the normal values but did not raise the issue of the prospective anti-dumping duty assessment regime.

[13] Following the filing of the memoranda by Nippon Steel and JFE, this Court released its decision in *SeAH Steel Corp. v. Evraz Inc. NA Canada*, 2017 FCA 172 (*SeAH*), in relation to the jurisdiction of this Court to review decisions of the President of the CBSA. In *SeAH*, this Court held that a final determination that goods of a country had been dumped and that the margin of dumping was not insignificant could not be set aside solely on the basis that even though the amounts as used by the President may change, the final determination would not be affected.

Nippon Steel and JFE filed supplementary memoranda in which they submitted that this Court should not follow *SeAH*.

II. Issues

[14] The issues are:

a) did the President err in determining that the trading companies were the exporters of LDLP for the purposes of SIMA;
b) should the Final Determination be set aside on the basis that the President erred in the calculation of the normal values; and
c) should any prospective anti-dumping duty assessment regime be set aside?

[15] The scope of the jurisdiction of this Court to set aside decisions made by the President is relevant for all of these issues. It is discussed below in relation to the calculation of the normal values, as the Final Determination is a quantitative comparison between two amounts – the margin of dumping as specified for Japan and 2%. Since, in my view, the arguments related to the identity of the exporters (a finding that is not based on any calculation of any amount) will not be successful in any event, I will address these arguments first.

III. Standard of Review

[16] The standard of review for the President's Final Determination is reasonableness (*Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG, et al.*, 2006 FCA 398, [2007] 4 F.C.R. 101, at paras. 58-63).

IV. Analysis

A. Identity of the Exporters

[17] JFE and Nippon Steel submitted that the President erred in concluding that the trading companies were the exporters for the purposes of SIMA. Both JFE and Nippon Steel argued that, as the producers of LDLP, they were the exporters. Neither JFE nor Nippon Steel provided any guidance with respect to the impact that changing the exporters would have on the calculation of the margin of dumping for Japan and, in particular, whether finding that JFE and Nippon Steel were the exporters would result in the margin of dumping for Japan being insignificant for the period of investigation. As a result, even if the finding of the President that the trading companies were the exporters was not reasonable, it would not lead to the conclusion that the finding of the President that LDLP of Japan was dumped and that the margin of dumping was not insignificant, was not reasonable.

[18] Although the term "exporter" is used throughout the provisions dealing with the determination of the normal value and export price, the term "exporter" is not defined in SIMA.

[19] JFE and Nippon Steel made submissions to the President of the CBSA that they, as the producers of LDLP, were the exporters for the purposes of SIMA and not the trading companies. However, the President, after examining the evidence available for each group of companies, determined that the trading companies were the exporters for the purposes of SIMA. The decision of the President on this issue is as follows:

> The CBSA determined that Sumitomo, Metal One and Marubeni Steel were the exporters of the subject goods, based on the following considerations, the details of which are confidential:
>
> 1) the roles of the parties as they relate to exercising the power to send the goods to Canada:
>
> a) ownership of the goods including ownership at the time the goods were sent to Canada
>
> b) the parties that incurred costs for logistics services and insurance
>
> c) the roles of the parties in designating the vessel on which the goods were shipped to Canada
>
> d information on commercial invoices
>
> e) information on bills of lading
>
> f) information on export permits
>
> g) information in contracts
>
> h) statements of the parties in relation to the above
>
> 2) the roles of the parties in determining prices to Canada:
>
> a) ownership of the goods including ownership at the time the goods were sent to Canada

b) information on commercial invoices

c) information in contracts

d) the roles of the parties in securing sales to Canada

e) the roles of the parties in communicating with customers in Canada

f) statements of the parties in relation to the above

[20] This is simply a list of the considerations that the CBSA indicated were taken into account in determining that the trading companies were the exporters. There is no indication of what facts were found by the President or how any facts that were found led to the conclusion that the trading companies were the exporters. Although a person may designate certain information that such person wishes to be kept confidential (section 85 of SIMA), the President may determine that the designation is unwarranted (subsection 86(2) of SIMA) which could result in either a removal of the confidential designation or the exclusion of that information from the proceedings.

[21] It is far from clear why all of the facts that would be relevant for the considerations listed above would be confidential. For example, the first consideration is the "ownership of the goods including ownership at the time the goods were sent to Canada". The supply chain as set out below is disclosed in the public memorandum filed by Nippon Steel. While ownership of the LDLP is not expressly addressed, it is a reasonable inference that since the trading companies ordered the LDLP from the producers, title passed from the producers to the trading companies.

[22] In any event, even if certain facts are confidential, there is no explanation of why confidential reasons could not have been provided to allow the applicants and this Court to know why the President determined that the trading companies were the exporters. Parties are entitled to reasons not simply a list of considerations.

[23] However, in this case it appears that the descriptions given by JFE and Nippon Steel of the transactions that resulted in LDLP being imported into Canada are substantially similar. The description of the transactions by Nippon Steel in its memorandum is as follows:

> **11.** Canadian customers use requests for quotation ("RFQ") to procure LDLP from producers such as Nippon Steel or JFE (the "Producers"). The Producers structure their LDLP exports through Japanese trading companies such as Sumitomo, Metal One, or Marubeni Steel (the "Trading Companies") and importers in Canada (the "Importers"). The Importers respond directly to the RFQ based on a quote from a Producer. If the Importer's bid is successful, the Canadian customer and the Importer enter into an LDLP supply contract. The Importer orders the LDLP specified by the Canadian customer from the Trading Company. The Trading Company in turn orders the LDLP from the Producer. The Producers and Trading Companies have non-exclusive commercial relationships.

[24] As a result the LDLP was not sold directly by JFE and Nippon Steel to the purchasers in Canada but rather was sold through the trading companies as intermediaries. It is also evident that the focus of the submissions on the identity of the exporters was on the decision of the CITT in *EMCO Electric International – Electrical Resource International v. President of the Canada Border Services Agency* (25 June 2009), CITT AP-2008-010 (*EMCO*). In *EMCO* the issue before the CITT was whether the producer of certain goods in China or the intermediary company through whom the goods were sold was the exporter of the particular goods in question. In *EMCO*, the President of the CBSA submitted that the producer of the goods was the exporter for

the purposes of SIMA and EMCO submitted that the intermediary (Plumbtek Industries Inc. (Plumbtek)) was the exporter. The CITT summarized the argument of the CBSA:

> **24.** The CBSA argued that it was important to look behind the transactions to see who knowingly provided the goods in issue for export to Canada. In its view, Plumbtek's ownership of the goods in issue at the time of exportation is not sufficient to establish it as the exporter. According to the CBSA, since Plumbtek does not manufacture goods, does not sell any goods domestically, does not warehouse or otherwise physically handle goods, it can best be described as a trading company that merely provided a service by facilitating sales to EMCO. It argued that arranging for transport and completing documents are services that could have been provided by anyone, regardless of location.

[25] The CITT did not agree with the President of the CBSA and found that Plumbtek was the exporter for the purposes of SIMA.

[26] In this case, JFE is essentially making the same arguments that were made by the President of the CBSA in *EMCO* and is attempting to distinguish *EMCO*, while Nippon Steel is not trying to distinguish *EMCO* but rather is asking this Court to overturn *EMCO*.

[27] In its memorandum, JFE submitted that "there is no 'Plumbtek-type' independent purchaser-reseller in Japan". No explanation for this statement is provided. From the description of the transactions in paragraphs 16 to 19 of JFE's memorandum, it is a reasonable inference that the trading companies were the purchasers of LDLP from JFE. In paragraph 19 JFE states that:

> [i]n no circumstances did a trading company purchase line pipe (or any other steel product) from JFE on speculation, or without a firm order first concluded with a Canadian customer.

[28] Even though the trading companies had a firm order from a Canadian customer, it appears that they purchased LDLP from JFE (which they resold to another company). As a result, the trading companies would be purchasers-resellers in Japan. In *EMCO*, Plumbtek was also a purchaser-reseller and the CITT noted that "Plumbtek's dealings with the goods in issue were largely effected through a series of paper-based transactions". Therefore, both in this case and in *EMCO*, there was a purchaser-reseller whose dealings with the goods in question were largely effected through paper transactions.

[29] If the basis for JFE's statement that "there is no 'Plumbtek-type' independent purchaser-reseller in Japan" is that, in its view, there are no "independent" purchasers-resellers, then this statement would have to be reconciled with the statement of JFE that appears to suggest that only one trading company with which it was dealing was an affiliate of JFE. JFE's argument based on the finding of the CITT that there was no evidence that Plumbtek was not dealing at arm's length with the producer or its selling agent is addressed below.

[30] As a result, JFE has failed to establish a basis for its statement that "there is no 'Plumbtek-type' independent purchaser-reseller in Japan".

[31] JFE also suggested that *EMCO* could be distinguished on the basis that EMCO never communicated with the producer or its selling agent and did not know the identity of the producer until after it had placed the order. In this case, JFE submitted that the Canadian customers were aware that JFE was the producer. However, simply knowing the identity of the

producer does not change the legal relationships created by the documents that were signed or the fact that title to the goods still passed through the trading company.

[32] JFE submitted that in *EMCO* Plumbtek was not acting as the agent of the producer or its selling agent while, in this case, "the trading companies worked on a commission basis as agents of JFE". The footnote reference to the supporting documents is "JFE Confidential Response B7, B8 to CBSA Record Exhibit 57, Application Record of JFE, Tab 5, page." The footnote reference is incomplete as no page number is identified. However, the responses identified as B7 and B8 appear on pages 147 and 148 of the record of JFE. The responses simply indicate that JFE has agreements with each of the trading companies that address "general matters relating to the purchase and sale of steel products" and that provide for the payment of a commission.

[33] In *EMCO*, the finding that Plumbtek was not acting as the agent of the producer supported a finding that "Plumbtek, acting on its own account, was the owner of the goods in issue at the point in time when the goods were sent to Canada and, hence, was the entity that exercised the power to send the goods in issue to Canada" (paragraph 44 of the reasons in *EMCO*). The brief description of the arrangement with the trading companies to which JFE referred in its memorandum is not sufficient to distinguish this case from *EMCO*.

[34] The final point raised by JFE to distinguish *EMCO* is that the CITT, in *EMCO*, found that "the evidence does not indicate any kind of non-arm's length relationship between Plumbtek and the producer or its selling agent" (paragraph 43 of the reasons in *EMCO*). JFE submitted that, "[i]n JFE's case by contrast, one of the trading companies shipping subject goods to Canada was

JFE Shoji America, an affiliate of JFE". However, JFE Shoji America was not one of the three trading companies that the President found to be the exporters in this case.

[35] As a result JFE has failed to establish that this case can be distinguished from *EMCO* in any material way.

[36] The submissions made by Nippon Steel in relation to its request to overturn *EMCO* are based on the assumption that there is only one correct interpretation of "exporter" for the purposes of SIMA. However, as the Supreme Court noted in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[37] Nippon Steel has failed to establish that the interpretation of "exporter" as found by the CITT in *EMCO* would be outside the range of reasonable possible outcomes. Even though there may be another possible interpretation of exporter, it does not mean that the interpretation adopted by the CITT is unreasonable.

[38] As a result, it was reasonable, based on *EMCO*, for the President to find that the trading companies in this case were the exporters. Therefore, the applicants cannot succeed in this application in relation to the determination by the President that the trading companies were the exporters.

B. Calculation of Normal Values

[39] In this case, in calculating the normal values, the President used profit amounts obtained from Nippon Steel and JFE. Both Nippon Steel and JFE submit that the President used amounts for profits for products that should not have been considered by the President. Neither applicant, however, has provided any guidance or indication of how this would impact the Final Determination made by the President.

[40] As noted above, the applicants submitted that this Court should not follow *SeAH* in relation to the jurisdiction of this Court to review decisions of the President of the CBSA. JFE, in its memorandum, also indicated that it was making its application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. These submissions are effectively premised on the argument that either this Court has the jurisdiction to review any decision made by the President of the CBSA or that the powers granted to this Court under section 18.1(3) of the *Federal Courts Act*, when this Court is hearing an application for judicial review under that *Act*, would be applicable in these applications.

[41] However, this Court only has the jurisdiction that has been granted to it by Parliament (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33).

[42] Subsection 28(2) of the *Federal Courts Act* provides that:

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.	**(2)** Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

[43] Subsection 28(1) of the *Federal Courts Act* contains a list of the federal boards, commissions and other tribunals in respect of which an application for judicial review can be made to this Court. The President of the CBSA is not included in the list of federal boards, commissions and other tribunals as set out in subsection 28(1) of the *Federal Courts Act*. Therefore, there is no right to apply to this Court for judicial review of any decision of the President of the CBSA under section 28 of the *Federal Courts Act*. The right to apply to this Court to review the Final Determination is found in SIMA, not the *Federal Courts Act*.

[44] In particular, subsections 96.1(1) and (6) of SIMA, at the relevant time, provided that:

96.1(1) Subject to section 77.012 or 77.12, an application may be made to the Federal Court of Appeal to review and set aside	**96.1(1)** Sous réserve des articles 77.012 et 77.12, une demande de révision et d'annulation peut être présentée à la Cour d'appel fédérale relativement aux décisions, ordonnances ou conclusions suivantes:

(*a*) a final determination of the President under paragraph 41(1)(*a*);

a) la décision définitive rendue par le président au titre de l'alinéa 41(1)*a*);

(*b*) a decision of the President under paragraph 41(1)(*b*) to cause an investigation to be terminated;

b) la décision rendue par le président au titre de l'alinéa 41(1)*b*) de faire clore une enquête;

(*c*) a decision of the President under subsection 53(1) to renew or not to renew an undertaking;

c) la décision du président de renouveler ou non un engagement rendue au titre du paragraphe 53(1);

(*c.1*) an order or finding of the Tribunal under subsection 43(1);

c.1) l'ordonnance ou les conclusions rendues par le Tribunal au titre du paragraphe 43(1);

(*d*) an order of the Tribunal under subsection 76.01(4) or 76.03(5);

d) l'ordonnance rendue par le Tribunal au titre des paragraphes 76.01(4) ou 76.03(5);

(*d.1*) a determination of the President under paragraph 76.03(7)(*a*);

d.1) la décision rendue par le président au titre de l'alinéa 76.03(7)*a*);

(*e*) an order or finding of the Tribunal under subsection 76.02(4) respecting a review under subsection 76.02(1);

e) l'ordonnance ou les conclusions rendues par le Tribunal au titre du paragraphe 76.02(4) et relatives au réexamen prévu au paragraphe 76.02(1);

(*f*) an order of the Tribunal under subsection 76.01(5) or 76.03(12); or

f) l'ordonnance rendue par le Tribunal au titre des paragraphes 76.01(5) ou 76.03(12);

(*g*) an order or finding of the Tribunal under subsection 91(3).

g) les ordonnances ou conclusions rendues par le Tribunal au titre du paragraphe 91(3).

96.1(6) On an application under this section, the Federal Court of Appeal may dismiss the application, set aside the final determination, decision, order or finding, or set aside the final determination, decision, order or finding and refer the matter back to the President or the Tribunal, as the case may be, for determination in accordance with such directions as it considers appropriate.	**96.1(6)** La cour peut soit rejeter la demande, soit annuler la décision, l'ordonnance ou les conclusions avec ou sans renvoi de l'affaire au président ou au Tribunal, selon le cas, pour qu'il y donne suite selon les instructions qu'elle juge indiquées.

[45] The remedies that this Court may grant under this provision are limited. The powers granted under section 18.1(3) of the *Federal Courts Act* are only granted to this Court under section 28(2) of that *Act* if the matter is within the jurisdiction of this Court under subsection 28(1) of that Act. Since the jurisdiction to review the Final Determination was not granted under subsection 28(1) of the *Federal Courts Act*, but rather under SIMA, the general powers granted under subsection 18.1(3) of the *Federal Courts Act* are not available to this Court in this application to review the Final Determination. The only powers that have been granted to this Court are those found in subsection 96.1(6) of SIMA. This Court can only dismiss the application or set aside the Final Determination made by the President. If the Final Determination is set aside, this Court could refer the matter back to the President for redetermination in accordance with such directions as may be appropriate but the matter can only be referred back if the Final Determination is set aside.

[46] It is therefore important to identify what is the "final determination of the President under paragraph 41(1)(a)" as the jurisdiction granted to this Court under section 96.1 of SIMA is the jurisdiction to "review and set aside" this final determination. The reference in subsection 96.1(6) of SIMA to setting aside a decision, order or finding would relate to paragraphs (*c*), (*c.1*),

(*d*), (*e*), (*f*) and (*g*) of subsection 96.1(1), as these paragraphs specifically refer to a decision, order or finding. There is no general right granted to this Court to review any finding or matter determined by the President other than the "final determination" under paragraph 41(1)(*a*) of SIMA or one of the other determinations or decisions referred to in paragraphs 96.1(1)(*b*), (*c*), or (*d.1*) of SIMA (none of which are applicable in this case).

[47] Paragraph 41(1)(*a*) of SIMA, at the relevant time, provided that:

41(1) Within ninety days after making a preliminary determination under subsection 38(1) in respect of goods of a country or countries, the President shall	**41(1)** Dans les quatre-vingt-dix jours suivant sa décision rendue en vertu du paragraphe 38(1) au sujet de marchandises d'un ou de plusieurs pays, le président, selon le cas :
(*a*) if, on the available evidence, the President is satisfied, in relation to the goods of that country or countries in respect of which the investigation is made, that	*a*) si, au vu des éléments de preuve disponibles, il est convaincu, au sujet des marchandises visées par l'enquête, des faits suivants :
(i) the goods have been dumped or subsidized, and	(i) les marchandises ont été sous-évaluées ou subventionnées,
(ii) the margin of dumping of, or the amount of subsidy on, the goods of that country or of any of those countries is not insignificant,	(ii) la marge de dumping ou le montant de subvention octroyé, relativement aux marchandises d'un ou de plusieurs de ces pays, n'est pas minimal,
make a final determination of dumping or subsidizing with respect to the goods after specifying, in relation to each exporter of goods of that country or countries in respect of which the investigation is made as follows:	rend une décision définitive de dumping ou de subventionnement après avoir précisé, pour chacun des exportateurs — visés par l'enquête — des marchandises d'un ou de plusieurs de ces pays :

(iii) in the case of dumped goods, specifying the goods to which the determination applies and the margin of dumping of the goods, and	(iii) dans le cas de marchandises sous-évaluées, les marchandises objet de la décision et leur marge de dumping,
(iv) in the case of subsidized goods,	(iv) dans le cas de marchandises subventionnées :
(A) specifying the goods to which the determination applies,	(A) les marchandises objet de la décision,
(B) specifying the amount of subsidy on the goods, and	(B) le montant de subvention octroyée pour elles,
(C) subject to subsection (2), where the whole or any part of the subsidy on the goods is a prohibited subsidy, specifying the amount of the prohibited subsidy on the goods; …	(C) sous réserve du paragraphe (2), le montant, s'il y a lieu, de la subvention prohibée octroyée pour elles; […]

(emphasis added) (soulignement ajouté)

[48] The final determination under this paragraph is made in relation to goods of a certain *country*, not goods of a certain *exporter*. There are two conditions that must be satisfied in order for a final determination to be made – that certain goods of a particular country have been dumped and that the margin of dumping is not insignificant. Subsection 2(1) of SIMA provides, in part, that:

Insignificant means,	Minimale s'entend :
(*a*) in relation to a margin of dumping, a margin of dumping that is less than two per cent of the export price of the goods …	*a*) dans le cas de la marge de dumping, d'une marge inférieure à deux pour cent du prix à l'exportation des marchandises […]

[49] Therefore, if the President is satisfied that goods have been dumped and that the margin of dumping is 2% or more, then the President must make a final determination of dumping as the language of paragraph 41(1)(*a*) of SIMA is obligatory ("the President shall…"). This final determination is made, as paragraph 41(1)(*a*) of SIMA provides, *after* specifying the goods and the margin of dumping for those goods. Under paragraph 41(1)(*a*) of SIMA there are two parts to the process – the particular goods and the margin of dumping are specified, and then the final determination that goods have been dumped and that the margin of dumping is not insignificant is made.

[50] This two-step process is reflected in the documents that were issued in this case. In the document entitled "SIMA – PRESIDENT DECISIONS PERFORMED BY THE DIRECTOR GENERAL REGARDING THE FINAL DETERMINATIONS OF LARGE LINE PIPE FROM THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN", a description of the goods is set out in the first page. Following this description of the goods, this document includes the following:

> Pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* (SIMA) and as authorized by the SIMA Delegation Instrument signed on August 1, 2012, I hereby specify, in respect of large line pipe;
>
> a. the margin of dumping respecting imports originating in or exported from the People's Republic of China and Japan; and
>
> b. the amount of subsidy respecting imports originating in or exported from the People's Republic of China.
>
> The margins of dumping and amounts of subsidy are listed in the attached Schedule A and Schedule B, respectively.
>
> (emphasis added)

[51] Schedule A provides the weighted average margin of dumping expressed as a percentage of export price for each of the three trading companies identified as exporters in this case and for all other exporters. It also provides the total margin of dumping for Japan (48.1%). This document is consistent with paragraph 41(1)(*a*) of SIMA as it provides that these amounts are specified separately from the final determination.

[52] In a separate document entitled "SIMA – FINAL DETERMINATIONS OF DUMPING AND SUBSIDIZING LARGE LINE PIPE ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN", a description of the goods in question is again set out on the first page of this document. Following the description of the goods, this document provides that:

> Pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* (SIMA), and as authorized by the SIMA Delegation Instrument signed on August 1, 2012, I hereby make final determinations of dumping and subsidizing in respect of certain welded large diameter carbon and alloy steel line pipe originating in or exported from the People's Republic of China and Japan.
>
> I hereby determine that the above-mentioned goods have been dumped and that the margin of dumping on the goods is not insignificant. I also determine that the above-mentioned goods have been subsidized and that the amount of subsidy is not insignificant.

[53] This document is the Final Determination. The Final Determination was simply that goods were dumped and that the margin of dumping was not insignificant. The Final Determination did not contain the specific margin of dumping specified for any particular exporter or for Japan. This same Final Determination would be made regardless of whether the margin of dumping for Japan was 4.8% or 48% or 480% or any other amount that is 2% or more.

[54] The Final Determination of dumping was based on a finding that the margin of dumping for all of the exporters from Japan for the period of investigation was 48.1%. The investigation "covered all subject goods released into Canada from July 1, 2014 to December 31, 2015" (paragraph 12 of the reasons for the Final Determination).

[55] As noted above, there is no indication of how the margin of dumping for Japan for the period from July 1, 2014 to December 31, 2015 would be changed if the submissions of JFE and Nippon Steel were to be accepted. Assume that if the submissions were successful, the margin of dumping for Japan would be reduced from 48.1% to 24%. While this would represent a reduction of 50%, the condition that the margin of dumping is not insignificant would still be satisfied and the President would still be obligated to make the final determination of dumping under paragraph 41(1)(*a*) of SIMA. The final determination as contained in the document identified as "SIMA – FINAL DETERMINATIONS OF DUMPING AND SUBSIDIZING…" would not change. The final determination, that goods were dumped and that the margin of dumping was not insignificant, would be reasonable, albeit based on a reduced margin of dumping for the country.

[56] Nippon Steel submits that the there are other consequences that arise from the President's findings with respect to the margin of dumping. Nippon Steel submits that the magnitude of the margin of dumping is a factor that the CITT can consider in deciding whether the dumping has caused injury and that margins of dumping specified for the particular exporters will be used if those exporters later ship any of the subject goods to Canada.

[57] Subparagraph 37.1(1)(*c*)(ii.1) of the *Special Import Measures Regulations*, SOR/84-927, provides that "the magnitude of the margin of dumping" is a factor that may be considered in determining whether the dumping of goods has caused injury or retardation. The injury finding that is made following the Final Determination is made under section 43 of SIMA which sets out a strict timeline for the CITT to make an order following the Final Determination:

43(1) In any inquiry referred to in section 42 in respect of any goods, the Tribunal shall, forthwith after the date of receipt of notice of a final determination of dumping or subsidizing with respect to any of those goods, but, in any event, not later than one hundred and twenty days after the date of receipt of notice of a preliminary determination with respect to the goods, make such order or finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.	**43(1)** Dans le cas des enquêtes visées à l'article 42, le Tribunal rend, à l'égard de marchandises faisant l'objet d'une décision définitive de dumping ou de subventionnement, les ordonnances ou les conclusions indiquées dans chaque cas en y précisant les marchandises concernées et, le cas échéant, leur fournisseur et leur pays d'exportation. Il rend ces ordonnances ou conclusions dès réception de l'avis de cette décision définitive mais, au plus tard, dans les cent vingt jours suivant la date à laquelle il reçoit l'avis de décision provisoire.

[58] The time limit within which the CITT is to make any order following the Final Determination is 120 days after the date of receipt of the notice of the preliminary determination. In this case, the preliminary determination of dumping was made by the CBSA on June 22, 2016. When the Final Determination of dumping was made on September 20, 2016 most of the 120 days had elapsed.

[59] There is nothing in this case to indicate that the magnitude of the margin of dumping was a relevant factor in any final order or finding made by the CITT under subsection 43(1) of SIMA

nor is there any indication that JFE or Nippon Steel brought an application to review such finding or order. An order or a finding of the CITT under subsection 43(1) of SIMA is also a matter that could have been the subject of an application to this Court to review and set aside under paragraph 96.1(1)(*c.1*) of SIMA. As well, the magnitude of the margin of dumping was not set out in the Final Determination but rather in the separate document that specified the margins of dumping.

[60] The applicants also argued that the margins of dumping for each exporter, as specified by the President, would be used in determining the amount of anti-dumping duties that would be imposed on future importations. The margins of dumping as specified by the President for each exporter were used to determine the margin of dumping for the particular country as provided in sections 30.1 and 30.2 of SIMA, at that time:

30.1 For the purposes of […] subparagraph 41(1)(*a*)(ii) […], the margin of dumping in relation to goods of a particular country is the weighted average of the margins of dumping determined in accordance with section 30.2.	**30.1** Pour l'application […] du sous-alinéa 41(1)*a*)(ii) […], la marge de dumping relative à des marchandises d'un pays donné est égale à la moyenne pondérée des marges de dumping établies conformément à l'article 30.2.
30.2(1) Subject to subsection (2), the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.	**30.2(1)** Sous réserve du paragraphe (2), la marge de dumping relative à des marchandises d'un exportateur donné est égale à zéro ou, s'il est positif, au résultat obtenu en retranchant la moyenne pondérée du prix à l'exportation des marchandises de la moyenne pondérée de la valeur normale des marchandises.

[61] This calculation of the margin of dumping was done in 2016 in relation to goods imported into Canada from July 1, 2014 to December 31, 2015. The Final Determination was made that goods were dumped during that period of time. There is no provision in SIMA that provides that any particular margin of dumping that was specified by the President for a particular exporter in making the Final Determination is to be used in the future when the goods that are the subject of anti-dumping duties arrive in Canada. The application of any duties in the future would be outside the scope of the Final Determination which is made for a particular period of time that has already elapsed.

[62] In this case the applicants have not shown that it was not reasonable for the President to determine that LDLP of Japan was dumped and that the margin of dumping was not insignificant. Therefore, the applicants cannot succeed in these applications to set aside the Final Determination.

C. Prospective anti-dumping assessment regime

[63] Nippon Steel, in its memorandum, also submitted that the President "restricted future normal values to the LDLP shipped during the POI [Period of Investigation], and applied the Ministerial Specification to 'new models' of LDLP". However, as noted above, there is no right under section 28 of the *Federal Courts Act* to make an application to this Court for judicial review of a decision of the President of the CBSA. Therefore, the only jurisdiction of this Court to directly review a determination or a decision of the President under SIMA is limited to the jurisdiction granted under section 96.1 of SIMA. None of the determinations or decisions of the

President as listed section 96.1 of SIMA includes the decision of the President to which Nippon Steel referred.

[64] In its Notice of Application, Nippon Steel clearly indicated, in the first paragraph under the heading "Application" that:

> [t]his is an application for judicial review pursuant to section 96.1 of the *Special Import Measures Act* (the "SIMA") in respect of the final determination of dumping and subsidizing made by the President of the Canada Border Services Agency and his delegates (the "President") on September 20, 2016 pursuant to paragraph 41(1)(*a*) of the SIMA regarding certain welded large diameter line pipe ("LDLP") originating in or exported from the Peoples Republic of China and Japan (the "Final Determination").

[65] As noted above, the Final Determination was based on the two conditions being satisfied – that goods were dumped during the period under review and that the margin of dumping for that same period was not insignificant. Any future specifications of normal values would be outside the scope of the Final Determination. It should also be noted that there is nothing in the reasons issued by the President in relation to the Final Determination that addresses this issue that has been raised by Nippon Steel.

[66] When Nippon Steel made the statement that the President "restricted future normal values to the LDLP shipped during the POI, and applied the Ministerial Specification to 'new models' of LDLP" in its memorandum, it identified two sources for this statement in footnote 43.

[67] The first reference in footnote 43 of its memorandum is to paragraphs 35 to 37 of the Statement of Reasons dated April 8, 2016. Paragraphs 35 to 37 from these reasons are as follows:

> **[35]** Generally, imports of large line pipe are either (1) marketed and sold to supply distributors (including international traders), who then in turn sell to end users, or (2) sold directly by the mill, typically in large volumes, to end users. Large line pipe is generally delivered directly from the pipe manufacturer to the end-user at the pipeline project location. A significant proportion of large line pipe sales are destined to large exploration and production companies and pipeline companies who purchase the line pipe for oil and gas transmission purposes.
>
> **[36]** According to the complainant, the sale of large line pipe generally involves procurement for very large transmission projects. Pipeline planning is a long process including permitting, land acquisition, government approvals, stakeholder relations, and procurement of labour and materials to construct a pipeline. As such, decisions made currently will affect production years in the future. For instance, the typical timeline for projects involving subject goods may be as follows: pipeline is announced in 2015; request for proposals are issued in 2017; pipe production may start in 2018; pipeline construction may run from 2018-2019; and full pipeline service may not occur until 2020 or later.
>
> **[37]** The complainant asserts that large line pipe is sold as a commodity-type product, and is sold primarily on the basis of price. Further Canadian, Chinese and Japanese suppliers produce large line pipe that meet the specifications of Canadian consumers, therefore domestic and imported large line pipe can be used interchangeably.

[68] There is no reference in any of these paragraphs to any application of a Ministerial Specification to new models of LDLP.

[69] The second reference cited by Nippon Steel in footnote 43 as support for the issue that is raised is “Tab 60 at 1714”. The document at page 1714 is part of the response of Nippon Steel to a supplementary request for information that was made by the CBSA on June 1, 2016. It would appear that the only two items listed on this page that are not part of the response of Nippon Steel are two requests for additional information.

[70] There is no reference on this page to the use of any Ministerial Specification for any new models of LDLP.

[71] There is a memorandum from the President of the CBSA to the Vice President, Programs Branch dated September 13, 2016 which is not included in footnote 43 of Nippon Steel's memorandum (applicants' record page 78). In this memorandum, it is indicated that:

> 1. For the purpose of the final determination and future shipments:
>
> …
>
> c) In respect of goods exported by any other exporter, or in circumstances where normal values cannot be determined in the manner described above, the normal value for large line pipe originating in or exported from China and Japan shall be determined based on the export price as determined under section 24, 25 or 29 of SIMA, plus an amount equal to 95.0% of that export price.

[72] The two preceding paragraphs a) and b) only address exporters in China. The part of this memorandum which Nippon Steel is presumably seeking to challenge is the part that relates to "future shipments". As noted above, this Court does not have any jurisdiction under section 28 of the *Federal Courts Act* to review any decision of the President of the CBSA and only limited jurisdiction under section 96.1 of SIMA to review certain determinations or decisions of the President. The references to the decisions of the President in paragraphs 96.1(1)(*b*) and (*c*) of SIMA would not apply to any decision of the President as it relates to the normal values for future shipments. Likewise the reference to a determination of the President in paragraph 96.1(1)(*d.1*) of SIMA would not apply to any decision of the President as it relates to the normal values for future shipments.

[73] The only other reference to a decision or determination of the President in subsection 96.1(1) of SIMA is in paragraph 96.1(1)(*a*) which refers to a final determination under paragraph 41(1)(*a*). Any decision of the President related to the determination of normal values for future shipments of goods to Canada is outside the scope of a final determination under paragraph 41(1)(*a*) and, in particular, is outside the scope of the Final Determination. This is also confirmed by the wording of this memorandum from the President which indicates that it is "[f]or the purpose of the final determination and future shipments". Future shipments are not part of the Final Determination which was made in relation to the prior importation of goods during the period from July 1, 2014 to December 31, 2015.

[74] Letters dated September 20, 2016 were also sent to Sumitomo, Metal One and Marubeni Steel outlining this application of the ministerial specification of 95% in relation to certain future normal values (applicants' record pages 1338 – 1377). However, this potential determination of normal values for future shipments is not the Final Determination made by the President under paragraph 41(1)(*a*) of SIMA and therefore is not a matter that can be reviewed directly by this Court.

V. Conclusion

[75] As a result, the applicants have not established that it was not reasonable for the President to determine that LDLP exported from Japan had been dumped and that the margin of dumping was not insignificant. As a result, there is no basis to set aside the Final Determination as made by the President under paragraph 41(1)(*a*) of SIMA.

[76] I would dismiss these applications for review of the Final Determination with costs.

"Wyman W. Webb"
J.A.

“I agree
Mary J.L. Gleason J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A FINAL DETERMINATION OF THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY AND HIS DELEGATES ON SEPTEMBER 20, 2016 PURSUANT TO PARAGRAPH 41(1)(A) OF THE *SPECIAL IMPORT MEASURES ACT* (STATEMENT OF REASONS, DATED OCTOBER 5, 2016, BEARING NUMBER LLP 2016 IN)

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