

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200331

Docket: A-86-19

Citation: 2020 FCA 67

**CORAM: WEBB J.A.
RENNIE J.A.
MACTAVISH J.A.**

BETWEEN:

**ANGANG STEEL COMPANY LIMITED &
ANGANG INTERNATIONAL TRADE CORPORATION**

Applicants

and

**THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY (CBSA),
ARCELORMITTAL DOFASCO G.P. and STELCO INC.**

Respondents

Heard at Ottawa, Ontario, on December 11, 2019.

Judgment delivered at Ottawa, Ontario, on March 31, 2020.

PUBLIC REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**RENNIE J.A.
MACTAVISH J.A.**

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. The two are identical, there being no confidential information disclosed in the confidential reasons.

WEBB J.A.

[1] Angang Steel Company Limited and Angang International Trade Corporation (collectively Angang) brought an application for judicial review under paragraph 96.1(1)(b) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), in relation to the final determination of dumping made by the President (President) of the Canada Border Services Agency (CBSA) dated January 22, 2019 (Case number COR 2018 IN) with respect to certain

corrosion-resistant steel sheet from China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), India and South Korea (the Final Determination). The reasons for the Final Determination were released on February 6, 2019.

[2] The President determined that the responses provided by Angang to the questionnaires that the President had circulated were not sufficient to allow the determination of the normal value and export prices for the products in question. As a result, the President determined the normal value and export price pursuant to a ministerial specification made under subsection 29(1) of SIMA. The normal value for Angang was determined to be the export price plus an amount equal to 53.3% of that export price. The margin of dumping (which is the difference between the normal value and the export price) was therefore 53.3 % of the export price.

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

I. Background

[4] SIMA is the statute that provides for the imposition of anti-dumping and countervailing duties when goods are dumped into Canada. 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 (Minister) (section 29 of SIMA).

[5] 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. If an investigation has not been terminated under section 35 of SIMA, the President is responsible for the preliminary determination of the estimated margin of dumping for each exporter and the goods to which these apply (section 38 of SIMA). Within 90 days following the preliminary determination of dumping, the President must either:

- (a) terminate the investigation if the President is satisfied that there is no dumping or the margin of dumping is insignificant (paragraph 41(1)(a) of SIMA); or
- (b) if the investigation is not terminated, make a final determination that goods have been dumped and specify for each exporter the margin of dumping and the goods to which the determination applies (paragraph 41(1)(b) of SIMA).

[6] “Insignificant” is defined in subsection 2(1) of SIMA. This definition, in relation to a margin of dumping, reads:

insignificant means,

(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,...

minimale S'entend :

a) dans le cas de la marge de dumping, d'une marge inférieure à deux pour cent du prix à l'exportation des marchandises;

[7] 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). The CITT is also tasked with making any applicable order or finding as provided in section 43 of SIMA following a final determination made by the President. Anti-dumping duties are imposed under sections 3 to 5 of SIMA as a result of an order or finding made by the CITT. The final determination made by the President, in and of itself, does not result in the imposition of anti-dumping duties.

[8] Section 30.2 of SIMA provides that the margin of dumping in relation to any goods of a particular exporter is the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods. If this result is a negative number, the margin of dumping is zero. 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.

[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] If the President is of the opinion that insufficient information has been provided to allow the determination of the normal value or the export price, the amount to be used for such normal value or export price is the amount to be determined in the manner specified by the Minister. In this case, although the President used the information submitted by Angang to estimate the margin of dumping for the preliminary determination of dumping, the President, in making the Final Determination, had the opinion that the information received from Angang was not sufficient to allow a calculation of the margin of dumping (paragraph 141 of the reasons for the Final Determination).

[12] The normal value and export price for Angang (who was included in the group identified as “All Other Exporters – China” in the reasons for the Final Determination) was determined pursuant to a ministerial specification under subsection 29(1) of SIMA (paragraphs 176 to 184 of those reasons). The normal value was determined to be the export price plus an amount equal to 53.3% of that export price (paragraph 182). The margin of dumping was, therefore, specified to be 53.3 % of the export price (paragraph 184).

II. Issue

[13] In this application, Angang does not submit its margin of dumping is insignificant (i.e. less than 2% of the export price). Rather, it submits that the President should not have used the ministerial specification under subsection 29(1) of SIMA to determine its margin of dumping. Angang's submission, therefore, is that the President should have specified a lower margin of dumping under subparagraph 41(1)(b)(i) of SIMA for Angang (even though such revised amount would still be 2% or more of the export price).

[14] The issue in this application is whether this Court has the jurisdiction to set aside a final determination made by the President under paragraph 41(1)(b) of SIMA when the exporter, in relation to whom such determination was made, does not provide any basis for finding that the margin of dumping would be insignificant. To put this another way, can the final determination of the President under paragraph 41(1)(b) of SIMA be set aside if the margin of dumping, while still significant, would be less than the amount specified by the President?

[15] The issue in this case is, therefore, the interpretation of SIMA as it relates to the jurisdiction of this Court to set aside a final determination of dumping.

III. Analysis

[16] Statutory provisions are to be interpreted based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10, [2005] 2 S.C.R. 601).

A. *Textual Analysis*

[17] The starting point for the analysis, in this case, is subsection 96.1(1) of SIMA. This provision sets out the right to apply to this Court to review and set aside the Final Determination that is in issue in this application:

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:

...

[...]

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

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

[18] In *Seah Steel Corporation v. Evraz Inc. NA Canada*, 2017 FCA 172, [2017] F.C.J. No. 886 (QL) and in *JFE Steel Corporation v. Evraz Inc. NA Canada*, 2018 FCA 111, [2018] F.C.J. No. 705 (QL), this Court held that a final determination of dumping made by the President under section 41 of SIMA could not be set aside where a reduction in the margin of dumping would still result in the margin of dumping not being insignificant. For example, a reduction in the margin of dumping from 50% to 10% would not change the result that the margin of dumping was not insignificant, i.e. it was not less than 2% of the export price.

[19] Angang submits that SIMA has been amended and that *Seah Steel* and *JFE Steel* are no longer applicable. The particular amendments to which Angang refers are the amendments made to section 41 of SIMA. When *Seah Steel* and *JFE Steel* were decided, the final determination was made with respect to a particular country. The question was whether a particular country was dumping goods and whether the margin of dumping of the goods of the particular country was insignificant. The focus has now changed to a particular exporter rather than a particular country.

[20] Section 41 of SIMA now provides:

41 (1) Within 90 days after making a preliminary determination under subsection 38(1), the President shall

(a) terminate the investigation in respect of any goods of a particular exporter if, on the available evidence, the President is satisfied that there has been no dumping or subsidizing of the goods or that the margin of dumping of, or amount of subsidy on, those goods is insignificant; and

(b) make a final determination of dumping or subsidizing in respect of the goods that are the subject of the investigation and for which the investigation has not been terminated under paragraph (a) if, on the available evidence, the President is satisfied that there has been dumping or subsidizing and the President shall specify, in relation to each exporter of goods in respect of which the investigation is made, as follows:

41 (1) Dans les quatre-vingt-dix jours suivant sa décision provisoire rendue en vertu du paragraphe 38(1), le président, selon le cas :

a) clôt l'enquête au sujet des marchandises d'un exportateur donné si, au vu des éléments de preuve disponibles, il est convaincu qu'il n'y a pas de dumping ou de subventionnement des marchandises ou que la marge de dumping ou le montant de subvention octroyée relativement aux marchandises est minimal;

b) rend une décision définitive de dumping ou de subventionnement concernant les marchandises visées par l'enquête et au sujet desquelles n'a pas eu lieu la clôture d'enquête prévue à l'alinéa a) si, au vu des éléments de preuve disponibles, il est convaincu qu'il y a eu dumping ou subventionnement; dans ce cas, le président précise, relativement à chacun des exportateurs de marchandises à l'égard desquelles l'enquête est menée, ce qui suit :

<p>(i) in the case of dumped goods, the goods to which the determination applies and the margin of dumping of the goods, and</p>	<p>(i) dans le cas des marchandises sous-évaluées, les marchandises objet de la décision et leur marge de dumping,</p>
<p>(ii) in the case of subsidized goods,</p>	<p>(ii) dans le cas de marchandises subventionnées :</p>
<p>(A) the goods to which the determination applies,</p>	<p>(A) les marchandises objet de la décision,</p>
<p>(B) the amount of subsidy on the goods, and</p>	<p>(B) le montant de subvention octroyée pour elles,</p>
<p>(C) subject to subsection (2), if the whole or any part of the subsidy on the goods is a prohibited subsidy, the amount of the prohibited subsidy on the goods.</p>	<p>(C) sous réserve du paragraphe (2), lorsque tout ou partie de la subvention octroyée pour les marchandises est une subvention prohibée, le montant de toute subvention prohibée octroyée pour elles.</p>

[21] In interpreting section 41 of SIMA, the first step is to examine the text of this provision. As a result of the amendments made to section 41, the first decision of the President is whether the investigation is to be terminated with respect to a particular exporter under paragraph 41(1)(a) of SIMA. The investigation is to be terminated if the President is satisfied that there has been no dumping of the goods by that particular exporter or that the margin of dumping of those goods by that particular exporter is insignificant. Under subsection 2(1) of SIMA, “dumped, in relation to any goods, means that the normal value of the goods exceeds the export price thereof”. Therefore, goods are dumped if the normal value exceeds the export price of such goods, regardless of the amount of such difference. Once it has been determined that the normal value exceeds the export price, then the investigation with respect to the particular exporter can only be terminated if the President is satisfied that the margin of dumping of that exporter is less

than 2% of the export price. Any margin of dumping that is 2% or more would mean that the investigation cannot be terminated under paragraph 41(1)(a) of SIMA.

[22] Paragraph 96.1(1)(b) of SIMA provides that an application may be made to this Court “to review and set aside ... a final determination of the President under paragraph 41(1)(b)” (emphasis added). The only reference to a final determination in paragraph 41(1)(b) is in the opening part of this paragraph: “the President shall ... (b) make a final determination of dumping or subsidizing”. This final determination is to be made “in respect of the goods that are the subject of the investigation and for which the investigation has not been terminated under paragraph (a)”. The second part of this sentence simply identifies the goods to which the final determination will apply.

[23] The only condition that is imposed on the President in making this final determination is “if, on the available evidence, the President is satisfied that there has been dumping or subsidizing”. As noted above, “dumped” is defined in subsection 2(1) of SIMA:

dumped, in relation to any goods, means that the normal value of the goods exceeds the export price thereof;

[24] It is not clear why this condition is in paragraph (b) since under paragraph (a) the President must terminate an investigation if the President is satisfied that there has been no dumping. Therefore, in order for paragraph (b) to be applicable, the President must have been satisfied that there has both been dumping and that the margin of dumping is not insignificant (i.e. that the margin of dumping is 2% or more of the export price).

[25] Paragraph 41(1)(b) of SIMA imposes an additional obligation on the President. The text of the paragraph first provides that the President shall make a final determination of dumping and then continues with the second obligation requiring the President to specify the particular goods and the margin of dumping:

the President shall ... make a final determination of dumping ... and the President shall specify, in relation to each exporter of goods in respect of which the investigation is made, as follows

(i) in the case of dumped goods, the goods to which the determination applies and the margin of dumping of the goods....

[26] The text requires separate actions of the President – the making of a final determination of dumping and the specification of the particular goods and the margin of dumping. The right of review provided in paragraph 96.1(1)(b) of SIMA is specific and only applies to the final determination of the President.

[27] Angang submits that the amendments to section 41 are significant because the focus has changed from finding that a country is dumping to finding that a particular exporter is dumping. While the amendments to this section have changed the focus of the final determination from the country to the particular exporter, the threshold for the final determination has remained the same, i.e. whether the margin of dumping is insignificant.

[28] In my view, the change in the wording of section 41 does not change the result that a final determination of dumping cannot be set aside by this Court simply because the margin of dumping for a particular exporter, rather than a particular country, would be less than the amount as found by the President, if the margin of dumping would still be significant. The threshold for

the final determination that goods have been dumped under paragraph 41(1)(b) of SIMA is the finding that the margin of dumping is 2% or more. The same final determination that the goods of a particular exporter have been dumped and that the margin of dumping is not insignificant will be found whether the margin of dumping is 15% or 50%.

[29] Therefore, the textual analysis supports the finding that this Court can only review the final determination of dumping (i.e. that the normal value exceeds the export price and this difference is not insignificant). There would be no basis to set aside the Final Determination if this result would still be the same.

B. *Contextual and Purposive Analysis*

[30] Angang submits that the purpose for the amendments that were made to section 41 is to address a concern related to the previous version of section 41 identified in a decision of a panel of the World Trade Organization (WTO). The panel found that the previous version of this section (which is based on a determination that a country was dumping) was not in compliance with Article 5.8 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement). Article 5.8 provides:

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price....

[31] The application referred to in Article 5.8 is an application that initiates an investigation of alleged dumping. The WTO panel in *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe From the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WTO Doc WT / DS482 / R (Panel Report) noted:

7.18 The parties agree that the second sentence of Article 5.8 requires immediate termination of an investigation in the event that the “margin of dumping” is *de minimis*. The parties disagree whether the “margin of dumping” that triggers immediate termination relates to the exporting country as a whole, or to each exporter or producer individually. This is the issue that we must resolve.

7.19 The same issue was addressed by the panel and Appellate Body in *Mexico - Anti-Dumping Measures on Rice*. Both the panel and the Appellate Body found that the term “margin of dumping” in Article 5.8 refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping. The panel noted that Article 6.10 of the Anti-Dumping Agreement provides that “the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation....

...

7.37 We recall our view that the second sentence of Article 5.8, when read in light of the context of the phrase “margin of dumping” as used in other provisions of the Anti-Dumping Agreement, requires immediate termination of an investigation in respect of exporters that have individual *de minimis* margins of dumping. We further recall that this approach is consistent with the decisions of the panel and Appellate Body regarding the same issue in *Mexico - Anti-Dumping Measures on Rice*. For the reasons explained above, we find that Canada has failed to establish that there are cogent reasons for us to depart from those decisions. We therefore uphold Chinese Taipei’s claim that Canada violated the second sentence of Article 5.8 by failing to immediately terminate the investigation in respect of two Chinese Taipei exporters with *de minimis* margins of dumping.

[32] It seems clear that the main concern of Article 5.8 of the Anti-Dumping Agreement and the WTO panel decision was a lack of a requirement in SIMA to immediately terminate an investigation in relation to a particular exporter if the margin of dumping, as found for that exporter, was *de minimis*. As noted, “*de minimis*” means less than 2% of the export price. The concern of the WTO panel has, therefore, been addressed by the addition of paragraph 41(1)(a) of SIMA, which provides for the termination of an investigation if the margin of dumping for a particular exporter is insignificant. This decision is, however, of little assistance in interpreting paragraph 41(1)(b) of SIMA and, in particular, whether this Court could set aside a final determination of dumping if the exporter is not alleging that the margin of dumping applicable to that exporter is not insignificant, but rather that the margin of dumping should be less than the amount specified by the President.

[33] As part of the context, it is important to identify the relevance of the margin of dumping as specified by the President under subparagraph 41(1)(b)(i) of SIMA. As noted above, paragraph 41(1)(b) of SIMA provides that a final determination of dumping is to be made for any goods that are the subject of an investigation that has not been terminated under paragraph (a). The second obligation of the President under this paragraph is to specify, with respect to each exporter, the goods to which the determination of dumping applies and the margin of dumping of the goods. However, the particular margin of dumping that is specified for a particular exporter, as discussed below, is not used to determine the amount of any anti-dumping duty that may be imposed following a finding by the CITT. Rather, this specification of the margin of dumping allows the President to determine that the margin of dumping for a particular exporter is not insignificant.

[34] As noted above, anti-dumping duties are not imposed by the President on goods but rather on goods in respect of which the CITT has made an order or finding (section 3 of SIMA). Following the final determination of dumping by the President, the CITT is to make a determination of whether the dumped goods have caused injury or threaten to cause injury. If such finding is made, then, and only then, would anti-dumping duties be imposed.

[35] The limited role that the margin of dumping, as specified by the President under subparagraph 41(1)(b)(i) of SIMA, plays under SIMA is confirmed in the reasons for the Final Determination. In paragraph 255 of these reasons, it is noted:

[255] If the CITT finds that the dumped goods have caused injury, the anti-dumping duty payable on the subject goods released by the CBSA during the provisional period will be finalized pursuant to section 55 of SIMA. Imports released by the CBSA after the date of the CITT's finding will be subject to anti-dumping duty equal to the margin of dumping.

[36] Section 55 of SIMA reads:

55 (1) Where the President

(a) has made a final determination of dumping or subsidizing under subsection 41(1) with respect to any goods, and

(b) has, where applicable, received from the Tribunal an order or finding described in any of sections 4 to 6 with respect to the goods to which the final determination applies,

the President shall cause a designated officer to determine, not later than six months after the date of the order or finding,

55 (1) Après avoir :

a) rendu la décision définitive de dumping ou de subventionnement prévue au paragraphe 41(1);

b) reçu, le cas échéant, l'ordonnance ou les conclusions du Tribunal visées à l'un des articles 4 à 6 au sujet des marchandises objet de la décision définitive,

le président fait déterminer par un agent désigné, dans les six mois suivant la date de l'ordonnance ou des conclusions :

(c) in respect of any goods referred to in subsection (2), whether the goods are in fact goods of the same description as goods described in the order or finding,	c) la question de savoir si les marchandises visées au paragraphe (2) sont en fait de même description que celles désignées dans l'ordonnance ou les conclusions;
(d) the normal value and export price of or the amount of subsidy on the goods so released, and	d) la valeur normale et le prix à l'exportation de ces marchandises ou le montant de subvention octroyée pour elles;
(e) where section 6 or 10 applies in respect of the goods, the amount of the export subsidy on the goods.	e) si les articles 6 ou 10 s'appliquent aux marchandises, le montant de la subvention à l'exportation octroyée pour elles.

[37] This section provides that the President is to designate another person to determine the normal value and export price, i.e. the margin of dumping, for any goods that have been released (subsections 55(1) and (2) of SIMA). If Parliament had intended that the margin of dumping, as determined by the President in making the Final Determination, would also be used to impose any anti-dumping duty on goods that have been released, section 55 of SIMA could have provided for this result. However, this section provides that the President is to designate another officer to make this determination within six months of the date of the order or finding of the CITT.

[38] As a result, it is clear that Parliament did not intend that the margin of dumping, as determined by the President in making any final determination of dumping, would be used to calculate the amount of any anti-dumping duties that may be imposed on any goods that have already been imported. The granting of an additional six months in section 55 of SIMA for the designated officer to make the determinations of the normal value and export price also supports a finding that Parliament did not intend that the designated officer simply use the amounts as

specified by the President under subparagraph 41(1)(b)(i) of SIMA. Six months would not be required to determine the margin of dumping if the margin of dumping as specified by the President under subparagraph 41(1)(b)(i) of SIMA was to be used.

[39] As noted in paragraph 255 of the reasons, for any goods imported after the CITT has made a finding of injury, the amount of duty will be the margin of dumping. This term is defined in subsection 2(1) of SIMA:

margin of dumping, in relation to any goods, means, subject to sections 30.2 and 30.3, the amount by which the normal value of the goods exceeds the export price of the goods;	marge de dumping Sous réserve des articles 30.2 et 30.3, l'excédent de la valeur normale de marchandises sur leur prix à l'exportation.
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[40] Section 56 of SIMA contemplates that a designated officer will be making a determination of the normal value and export price for any goods that are imported after the CITT has made an order or a finding. Section 56 does not state that the margin of dumping will be the amount as specified by the President in making the final determination of dumping. Sections 56 to 62 of SIMA set out the rights of re-determination and appeal applicable to any determination made under subsection 55(1) or subsection 56(1) of SIMA.

[41] Therefore, Parliament did not provide that the amount of any anti-dumping duty that will be imposed on goods by the CITT would be the amount as specified by the President under subparagraph 41(1)(b)(i) of SIMA. Rather, Parliament provided that the amount of such duty would be determined separately.

[42] It is important to note that the information required to determine the margin of dumping (and hence the anti-dumping duty) is information that is within the knowledge of the exporter. The amount of the anti-dumping duty is the difference between the normal value and the export price (section 3 of SIMA and the definition of the margin of dumping in subsection 2(1) of SIMA). The normal value is generally the price at which the particular exporter sells like goods to an arm's length purchaser (section 15 of SIMA). There are a number of rules related to this determination, including the possibility of determining the normal value based on the cost of production plus an amount for administration and profit (section 19 of SIMA). The calculation of the normal value is a matter that is dependent on the exporter's information and, therefore, should be within the knowledge of the exporter.

[43] The export price is the particular exporter's selling price, subject to certain adjustments. The determination of the export price is also a matter that should be within the knowledge of the particular exporter.

[44] Therefore, the exporter should be able to establish the normal value and the export price to the designated officer who will be determining these amounts for the purpose of calculating the amount of any anti-dumping duty.

[45] As a result of the relatively short timeframes within which the President is to make a preliminary determination and a final determination, the process has been described as "a race against the clock" (*Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, (F.C.A.), 2006 FCA 398, at para. 45, [2007] 4 F.C.R. 101). The imposition of such time restraints supports

the conclusion that the purpose for specifying the margin of dumping under paragraph 41(1)(b) is to confirm that the margin of dumping for a particular exporter is not insignificant and not to calculate the amount of any anti-dumping duty that may subsequently be imposed. As noted above, the additional six months following an order or finding of the CITT for a designated officer to determine the margin of dumping for goods that were released before such order or finding under section 55 of SIMA also supports this conclusion.

[46] It is clear that Parliament did not intend that the margin of dumping, as specified by the President, would be used to impose the anti-dumping duty. There are no direct legal consequences of changing the margin of dumping from one amount, which would be 2% or more of the export price, to another, albeit different, amount, but which would also be 2% or more of the export price. Whether the margin of dumping is, for example, 15% or 50%, it is still above the *de minimus* threshold amount (less than 2%) under SIMA for determining if a margin of dumping is insignificant.

[47] 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. In this application, Angang has not made any submissions related to whether the magnitude of the margin of dumping was a factor that was relevant in any CITT decision. Nor has Angang made any submission that if its margin of dumping were to be less than the amount specified by the President, it could or would have an impact on any decision that the CITT has made in this case.

[48] As a result, under SIMA, the final determination that is made by the President and which is the subject of a review by this Court is the final determination of dumping in paragraph 41(1)(b) of SIMA. This determination will not change unless the margin of dumping is insignificant. In other situations, this Court has held that matters will not be sent back to a tribunal where the result is inevitable, even if errors were made in reaching a decision (*Tahmourpour v. Canada (Attorney General)*, 2013 FCA 2, [2013] F.C.J. No. 11 (QL)). As noted above, Angang has not argued that its margin of dumping, if the President had not used the ministerial specification, would be insignificant. Rather, Angang is simply arguing that it should not be as large as the President has specified.

IV. Conclusion

[49] In my view, the final determination of dumping that could be reviewed and set aside by this Court is the final determination that goods have been dumped. Since an investigation will be terminated under paragraph 41(1)(a) of SIMA if the margin of dumping is insignificant, the final determination under paragraph 41(1)(b) of SIMA is simply that the margin of dumping is not insignificant. There is no basis to set aside a decision of the President if the result would be the same (i.e. that the margin of dumping is not insignificant), even if the amount as specified by the President is greater than the amount that should have been specified. Since Angang has not submitted that its margin of dumping would be insignificant, there is no basis to set aside the Final Determination or to address its submissions related to the use of the ministerial specification under section 29(1) of SIMA to determine its margin of dumping.

[50] As a result, I would dismiss this application with costs. The costs are to be assessed using the mid-range of Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106.

"Wyman W. Webb"

J.A.

"I agree

Donald J. Rennie J.A."

"I agree

Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPLICATION FOR JUDICIAL REVIEW OF A FINAL DETERMINATION OF
DUMPING MADE BY THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY DATED JANUARY 22, 2019, (COR 2018 IN)**

DOCKET: A-86-19

STYLE OF CAUSE: ANGANG STEEL COMPANY
LIMITED & ANGANG
INTERNATIONAL TRADE
CORPORATION v. THE
PRESIDENT OF THE CANADA
BORDER SERVICES AGENCY
(CBSA), ARCELORMITTAL
DOFASCO G.P. and STELCO INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 11, 2019

PUBLIC REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
MACTAVISH J.A.

DATED: MARCH 31, 2020

APPEARANCES:

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