Federal Court of Appeal | Cour d'appel fédérale

Date: 20230725

Docket: A-39-21

Citation: 2023 FCA 164

CORAM: **GAUTHIER J.A.**
RIVOALEN J.A.
ROUSSEL J.A.

BETWEEN:

ALGOMA STEEL INC.

Applicant

and

ATTORNEY GENERAL OF CANADA and EREĞLI DEMIR VE ÇELIK FABRIKALARI T.A.Ş.

Respondents

Heard at Ottawa, Ontario, on December 7, 2022.

Judgment delivered at Ottawa, Ontario, on July 25, 2023.

PUBLIC REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: GAUTHIER J.A.
RIVOALEN J.A.

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PUBLIC REASONS FOR JUDGMENT

This is a public version of confidential reasons for judgment issued to the parties. There are no redactions from the confidential reasons for judgment.

ROUSSEL J.A.

[1] By notice of final determination issued on January 7, 2021, the President of the Canada Border Services Agency (CBSA) terminated the dumping investigation in respect of certain hot-

rolled carbon steel heavy plate and high-strength low-alloy steel heavy plate (heavy plate) exported to Canada from Turkey by Ereğli Demir ve Çelik Fabrikalari T.A.Ş. (Erdemir). On January 22, 2021, the CBSA issued its statement of reasons for the final determination. Pursuant to paragraph 41(1)(*a*) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), the CBSA found that the margin of dumping for Erdemir was zero (HP 2020 IN).

[2] As part of its investigation, the CBSA found that a particular market situation (PMS) did not exist in Turkey's heavy plate market such that the domestic sales did not permit a proper comparison with the sales to the importers in Canada (statement of reasons at para. 96).

[3] In this application for judicial review brought pursuant to section 96.1 of the SIMA, Algoma Steel Inc. (Algoma) challenges the CBSA's conclusion on the absence of a PMS in Turkey. It also contends that the CBSA's refusal to disclose certain worksheets relating to the calculation of preliminary dumping margins for Erdemir and to provide the final calculations by which it found that Erdemir had a dumping margin of zero amount to either a breach of procedural fairness or a failure to provide adequate and intelligible reasons.

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

I. Background

[5] Heavy plate is a commodity steel product used in a variety of applications, including the production of rail cars, oil and gas storage tanks, heavy machinery, agricultural equipment, bridges, industrial buildings, high-rise towers, ships and barges, and pressure vessels.

[6] Algoma manufactures heavy plate at its facility in Sault Ste. Marie, Ontario.

[7] In April 2020, Algoma filed a complaint with the CBSA pursuant to section 31 of the SIMA, alleging that certain heavy plate originating in, or exported from, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Germany, South Korea, Malaysia and Turkey was being dumped into Canada. Algoma requested that the CBSA initiate an investigation on the basis that the dumped goods had caused, and were threatening to cause, injury to the Canadian industry producing like goods. Algoma further claimed that a PMS existed in Turkey, such that neither domestic sales of heavy plate in Turkey nor Turkish exporter costs permitted a proper comparison with sales to importers in Canada (Applicant's Public Record, Vol. II at 298).

[8] The CBSA initiated its investigation on May 27, 2020. The period under investigation was March 1, 2019 to February 29, 2020. The CBSA collected information by way of requests for information (RFIs) and supplemental RFIs sent to potential importers and exporters, and other entities. Regarding the RFIs sent to Turkey, the CBSA received responses from the government of Turkey and Erdemir.

[9] On October 9, 2020, the CBSA issued a notice of preliminary decisions in which it made preliminary determinations of dumping of heavy plate originating in, or exported from, Chinese Taipei, Germany, and Turkey, and terminated its dumping investigation in respect to Malaysia and South Korea. In the statement of reasons concerning the preliminary determination issued on October 23, 2020, the CBSA estimated that Erdemir was dumping heavy plate by a margin of 2.9% (Applicant's Public Record, Vol. I at 81).

[10] On November 18, 2020, Algoma wrote to the CBSA requesting the preliminary determination calculation worksheets disclosed to Erdemir. The CBSA responded the next day by email that it did not share its calculations with other parties with the exception of the corresponding exporter (Applicant's Public Record, Vol. IV at 1002-1004, 1007).

[11] As part of the final phase of the investigation, the CBSA received additional information from Erdemir as well as case arguments and reply submissions from a number of interested parties, including Algoma and Erdemir.

[12] On January 7, 2021, the President of the CBSA issued a notice of final determination, wherein he terminated the dumping investigation in respect of heavy plate exported from Turkey by Erdemir pursuant to paragraph 41(1)(*a*) of the SIMA. The President also made a final determination of dumping of heavy plate from Chinese Taipei and Germany pursuant to paragraph 41(1)(*b*) of the SIMA.

[13] Subsequently, on January 22, 2021, the CBSA issued a 31-page statement of reasons (statement of reasons), describing the investigation process and setting out its analysis and the results of the dumping investigation for countries and their exporters.

[14] With respect to the existence of a PMS in Turkey's heavy plate market, the CBSA considered Algoma's allegations and examined the potentially contributing factors identified by Algoma. The CBSA indicated that, based on the information on the record, it did not form the opinion that a PMS existed in the heavy plate market in Turkey such that the domestic sales did not permit a proper comparison with the sales to the importers in Canada (statement of reason at para. 96).

[15] As for Erdemir, the CBSA indicated that "normal values could not be determined in accordance with section 15 of the SIMA as there were not such a number of sales of like goods that complied with all the terms and conditions referred to in sections 15 and 16 of [the] SIMA as to permit a proper comparison with the sales of the goods to the importer in Canada" (statement of reasons at para. 100). Consequently, normal values were determined in accordance with paragraph 19(*b*) of the SIMA, based on the aggregate of the cost of production of the goods, a reasonable amount for administrative, selling and all other costs, and a reasonable amount for profits. The cost of production of the goods was determined in accordance with paragraph 11(1)(*a*) of the *Special Import Measures Regulations*, SOR/84-927 (SIMR), and the amount of profits according to subparagraph 11(1)(*b*)(ii) of the SIMR. Export prices were determined in accordance with section 24 of the SIMA. The CBSA determined that the total

normal value compared to the total export price resulted in a zero margin of dumping for Erdemir.

[16] Although other potential exporters had been identified during the preliminary stage of the investigation, the CBSA found that Erdemir accounted for 100% of heavy plate exported from Turkey to Canada during the period of investigation. Consequently, for purposes of the final determination, the CBSA did not determine a margin of dumping for other exporters (Applicant's Public Record, Vol. I at 48).

[17] The statement of reasons included two appendices, the first providing a summary of the dumping margins for all exporters and the second summarizing the dumping representations of the parties.

[18] On February 5, 2021, Algoma filed the present application for judicial review, challenging only the CBSA's decision to terminate the dumping investigation with respect to heavy plate exported from Turkey by Erdemir.

II. Issues

[19] The following issues are raised in this application for judicial review:

i) What is the decision under review?

ii) Does the refusal on the part of the CBSA to provide Algoma the preliminary dumping calculations give rise to a breach of procedural fairness?

iii) Does the failure on the part of the CBSA to provide the President of the CBSA the final calculations pursuant to which it found that Erdemir had a dumping margin of zero (Calculations) render the final determination unreasonable?

iv) Does the failure on the part of the CBSA to include the Calculations in the statement of reasons give rise to a breach of procedural fairness or render the final determination unreasonable?

v) Does the failure on the part of the President of the CBSA to find that a PMS existed in the heavy plate market in Turkey render the final determination unreasonable?

III. Standard of review

[20] The decision to terminate the dumping investigation is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *JFE Steel Corporation v. Evraz Inc. NA Canada*, 2018 FCA 111 at para. 16, leave to appeal to SCC refused, 38276 (7 March 2019)).

[21] A decision that is reasonable is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and the law that constrain the decision maker" (*Vavilov* at para. 85). A reviewing court will only set aside the decision if it is "satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para. 100). The burden lies with the party challenging the decision.

[22] With respect to the issues of procedural fairness, the role of this Court is to determine whether the proceedings were fair in all the circumstances (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 54-56; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para. 35).

IV. Analysis

[23] It is important to state at the outset that the present application was heard immediately after another case raising substantially similar issues (*Canadian Hardwood Plywood and Veneer Association v. Canada (Attorney General)*, 2023 FCA 74, rendered on April 5, 2023). The same panel of judges heard both applications, respectively on December 6 and 7, 2022. One of Algoma's counsel was counsel for the applicants in *Canadian Hardwood*, and the same counsel represented the respondent Attorney General of Canada (AGC) in both cases. Counsel for the respondent Erdemir was also present during the hearing of the application in *Canadian Hardwood*. At the beginning of the hearing in this case, the Court invited counsel for Erdemir to respond to any arguments raised the previous day with which he was in disagreement, in order

that Erdemir not be prejudiced. Since the Court in *Canadian Hardwood* has already addressed in detail some of the arguments that are being raised by Algoma in this application, I will rely on those reasons where appropriate.

[24] Moreover, for the purposes of this application, it is not necessary to provide a full account of the statutory SIMA framework and of the policies and procedures set out in the SIMA Handbook that govern dumping investigations as they are well set out in *Canadian Hardwood* at paragraphs 12-36. It is, however, helpful to mention that the SIMA Handbook, while not binding on the President of the CBSA, remains a useful guide for the CBSA and all parties involved.

A. *Decision under Review*

[25] Strictly speaking, the decision under review is the final determination published by notice on January 7, 2021. However, for the reasons set out in *Canadian Hardwood* at paragraphs 58-62, the final determination must be read with the statement of reasons issued on January 22, 2021, and the confidential undated internal CBSA dumping memorandum from the Director General, Trade and Anti-dumping Programs Directorate to the Vice-President, Commercial and Trade Branch (dumping memorandum). The dumping memorandum, authored by the same person as the statement of reasons, contains the recommendations for the final determination.

[26] The final determination must also be read in light of the record and of the particular context of the decision under review (*Vavilov* at paras. 91-98). As in *Canadian Hardwood*, the

record in this case also contains a confidential undated CBSA memorandum prepared by a Senior Program Officer and approved by a Manager of the Anti-dumping and Countervailing Investigations Division, Trade and Anti-dumping Programs Directorate (PMS memorandum). It outlines the positions of the interested parties and explains why the CBSA did not form the opinion that a PMS existed in Turkey with respect to its heavy plate industry. The conclusions in the statement of reasons are consistent with the analysis set out in the PMS memorandum.

[27] Moreover, the SIMA provides for an explicit delegation of power pursuant to subsection 2(9): "[a]ny power, duty or function of the President under this Act may be exercised or performed by any person authorized by the President to do so and, if so exercised or performed, is deemed to have been exercised or performed by the President." The Vice-President, Commercial and Trade Branch and the Manager of the Anti-dumping and Countervailing Investigations Division, Trade and Anti-dumping Programs Directorate, both enjoy delegated authority (AGC's Confidential Record, Vol. I at 266, AGC's Public Record, Vol. I at 11).

[28] For these reasons, the final determination shall be read with the statement of reasons, the confidential dumping memorandum and the confidential PMS memorandum.

B. *Refusal to Provide Preliminary Dumping Calculations*

[29] As mentioned above, on November 18, 2020, Algoma wrote to the CBSA requesting the preliminary determination calculation worksheets disclosed to Erdemir. In making this request,

Algoma noted that the disclosure of this information to Erdemir only significantly limited Algoma's ability to participate meaningfully in the investigation, thus breaching the duty of fairness owed to Algoma as a participant and as a complainant in the proceeding. The CBSA responded the next day by email indicating that it did not share its calculations with other parties with the exception of the corresponding exporter.

[30] Before this Court, Algoma submits that the CBSA's disclosure of the calculations used to determine the margin of dumping for the preliminary determination conferred an unfair advantage to Erdemir, which used this highly relevant information to make specific submissions regarding the manner in which the CBSA ought to calculate its margin of dumping for the purposes of the final determination.

[31] In addition, in Algoma's view, the CBSA's apparent reliance on this Court's decision in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398 is misguided. Algoma argues that in *Uniboard*, the preliminary calculations were shared with the domestic producers in the underlying investigation (*Certain Laminate Flooring*, Statement of Reasons for Final Determination (June 1, 2005)). This disclosure of the preliminary calculations had "provided counsel with an opportunity to comment on the results of each exporter as they became available" (*Uniboard* at para. 43). Algoma adds that, in this case, sharing the calculations would not have required much time and would not have obstructed in any way the CBSA's investigation.

[32] According to Algoma, the CBSA's refusal to put the preliminary dumping margin calculations on the record and share them with the domestic producers constitutes a breach of procedural fairness.

[33] On the other hand, the AGC contends that the preliminary calculations form part of a distinct decision and are not determinative of the final calculations relied upon by the CBSA. After its preliminary determination, the CBSA continues its investigation and analyzes additional data. The margin of dumping estimates made for the preliminary determination in no way bind or predetermine the calculations the CBSA will use for the final determination. While the CBSA conducts its investigations in a transparent manner, there is no requirement that it provides the parties with its internal calculations. This would cause delays and undermine the efficiency of the investigation process. Under the SIMA, the President of the CBSA must make a preliminary dumping determination within 90 days of initiating an investigation (s. 38 of the SIMA), and then a final determination within 90 days of making its preliminary determination (s. 41 of the SIMA).

[34] The AGC also submits that participatory rights are at the low end of the procedural fairness spectrum. It relies on this Court's decision in *Uniboard* and on *Franke Kindred Canada Limited v. Jiangmen New Star Entreprise Ltd.*, 2014 FC 459, where the Federal Court found that the CBSA's refusal to disclose the preliminary calculations did not constitute a breach of procedural fairness (*Kindred* at para. 19).

[35] Erdemir echoes the AGC's argument, arguing that the CBSA's policy is to disclose these preliminary calculations to the party who has provided the information, to ensure that the data is accurate. The disclosure is meant only to verify factual correctness and to correct any mistakes pertaining to the exporter's data, not to review how the CBSA manipulated the information received or how it derived the normal value from it. Erdemir also pleaded that if the CBSA granted Algoma's request for Erdemir's information, this would hinder future cooperation from foreign producers to provide reliable data. Erdemir further submits that the President's preliminary determination is not subject to judicial review under subsection 96.1(1) of the SIMA, such that Algoma cannot raise arguments relating to that preliminary determination (Erdemir's memorandum of fact and law at para. 58).

[36] A calculation sheet of the margin of dumping calculated during the preliminary stage of the investigation, while not on the record, appears to have been shared with Erdemir only (Applicant's Public Record, Vol. IV at 999). Despite this information not being made available to Algoma, I am satisfied there was no breach of procedural fairness.

[37] Pursuant to subparagraph 38(1)(*a*)(i) of the SIMA, the CBSA is required to estimate the margin of dumping for the purposes of the preliminary determination. The CBSA will then meet with individual exporters upon request, to review these preliminary calculations used in estimating their respective margins of dumping. This practice of holding disclosure meetings with individual exporters is recognized in the SIMA Handbook at section 4.7.9, which is entitled "Disclosure Meetings".

[38] In *Uniboard*, this Court considered the duty of procedural fairness in the SIMA investigation process. It noted that dumping and subsidy investigations are subject to very strict statutory time limits (*Uniboard* at para. 29) and that, in certain cases, they may end up being a "race against the clock" (*Uniboard* at para. 45). It considered the statutory participatory rights of the parties to the investigations and found that they were at the "extreme bottom end of the procedural fairness scale" (*Uniboard* at para. 44).

[39] While it is true that the CBSA disclosed its preliminary calculations with the domestic producers in *Uniboard*, our Court recognized that this was done on an exceptional basis:

> In addition, and exceptionally, the Agency disclosed its preliminary calculations related to the final determination beginning on April 15, 2005. The Agency decided to disclose such information since the calculations were now based on verified information and indicated that there would be substantive changes from those reported at the preliminary determination. This approach provided counsel with an opportunity to comment on the results of each exporter as they became available.
>
> (At para. 43; My emphasis)

[40] In the case before me, I have not been persuaded of the existence of special circumstances warranting the disclosure of such information.

[41] Moreover, even though the Federal Court's decision in *Franke* is not binding on this Court, I find its analysis persuasive. In *Franke*, the applicant had complained to the CBSA that certain stainless steel sinks imported into Canada from China were being dumped and subsidized, causing injury to the Canadian industry. Following the CBSA's preliminary determination of dumping and subsidizing, the applicant requested copies of the calculations and

worksheets used by the CBSA to determine the provisional duty rate. The CBSA refused to disclose these documents to the applicant. Like Algoma, the applicant had argued that the internal worksheets and calculations had formed the basis of the CBSA's preliminary decision and the refusal to provide them deprived it of the ability to know and understand the information that led to the final determination (*Franke* at para. 13).

[42] The Federal Court found that the application was moot on the basis that there was no tangible and concrete dispute at issue, and that the outcome of the matter would not have any effect on the applicant's rights (*Franke* at para. 12). Indeed, the Court noted that the calculations requested by the applicant were based largely on unverified data, and used only to establish a provisional duty rate (*Franke* at para. 14). It also noted that SIMA investigations in the final determination stage were generally much more comprehensive than at the preliminary stage (*Franke* at para. 16). The Federal Court was mindful of this Court's decision in *Uniboard*, which had stated that such early information and analysis in the preliminary stage is internal and not subject to disclosure (*Franke* at para. 16, citing *Uniboard* at paras. 53-57). The Federal Court found that, without evidence supporting the applicant's assertion that the non-disclosure of the calculations and worksheets underlying the preliminary determination affected the protection sought, it could not interfere (*Franke* at para. 17).

[43] Despite finding that the application was moot, the Federal Court nevertheless considered whether the non-disclosure violated the applicant's right to procedural fairness. The Federal Court noted that the applicant was provided all of the information to which the CBSA had access in rendering its preliminary and final determinations, and that it was given full and fair

opportunity to present evidence and submissions relevant to the complaint, and to respond to the evidence before the CBSA. The Federal Court concluded that the applicant had not demonstrated a breach of procedural fairness in the CBSA's investigation (*Franke* at para. 22).

[44] Before us, there is no evidence that Algoma's counsel did not have access to all of the information provided by Erdemir and the government of Turkey. Moreover, it had the opportunity to submit case arguments and reply submissions. While Algoma did not have access to the preliminary calculations, the duty of fairness in this matter does not extend to the disclosure of these internal documents. Algoma's assertion that it would not be an onerous task for the CBSA to provide the calculations is inconsequential in my view.

[45] For the reasons above, I have not been persuaded that the failure to disclose the preliminary calculation worksheets to Algoma resulted in a breach of procedural fairness.

C. *Failure of the CBSA to Provide the Calculations to the President*

[46] On June 9, 2021, Algoma wrote to the AGC requesting the transmittal of the documents created and used by the CBSA to calculate the dumping margins that formed the basis of the CBSA's determination with respect to Erdemir. The AGC objected to Algoma's request on the basis that it was outside the scope of Rule 317 of the *Federal Courts Rules*, SOR/98-106, stating that the calculations were not before the President and were not relevant to the grounds raised in their Notice of Application (Applicant's Public Record, Vol. I at 982-996).

[47] Algoma maintains that the failure of the CBSA to have the Calculations before the President of the CBSA is a departure from the rule of law. In *Canadian Hardwood,* the applicants had raised a similar argument. The Court disposed of the issue as follows:

> [74] At the hearing before us, the applicants conceded that the calculations had been carried out by the CBSA. However, the applicants maintain that the calculations themselves should form part of the record and be before the decision maker. The applicants submit that the SIMA requires the CBSA to carry out the calculations using specified methodologies, and as a result, the decision maker not having access to these calculations is a departure from the rule of law. The applicants also say that, by not including the calculations in the Statement of Reasons, the President of the CBSA failed to provide adequate reasons.
>
> [75] I do not agree.
>
> [76] It is trite to say that administrative decision makers must execute their powers and authority according to their governing statute and in accordance with constitutional principles. A failure to do so can result in a challenge to the court by affected parties. The rule of law also protects against arbitrary decisions and sets limits to discretionary power.
>
> [77] In most administrative tribunals, the calculations or details of an investigation, such as notes of witness interviews, telephone conversations, or calculations are not before the decision maker. What is before the decision maker is usually a report summarizing the factual findings and the methodology used to investigate or determine an issue and reach a conclusion.
>
> [78] This is exactly what was done here. As submitted by the Attorney General of Canada, the decision maker had before it the Dumping Memorandum which summarized the investigation carried out by the CBSA, set out the methodologies used to calculate the margins of dumping and why these were adopted and identified the margins of dumping using those methodologies. As mentioned, in this particular case the same person authored the Dumping Memorandum and the Statement of Reasons. In addition, the PMS Memorandum was part of the evidentiary record.
>
> [79] In such circumstances, it is not unreasonable for the President of the CBSA to rely on the memoranda prepared by officers within the CBSA, without the need to see the detailed calculation spreadsheets and worksheets that led to these memoranda, given the volume of information

> and the complexity of the calculations generated for each exporter. This is even more reasonable given the statutory constraints and time limits imposed on the President.
>
> [80] Nothing in the SIMA requires the President of the CBSA to have the calculations before him when making the preliminary and final determinations. However, nothing would prevent the President from requesting access to such calculations, should it be deemed necessary. If the calculations were provided to the President, then the calculations would form part of the record and, thus, would become accessible to the applicants, subject to any confidentiality agreements or orders.
>
> [81] In the present application for judicial review, I do not accept that the President of the CBSA's discretion was exercised in an arbitrary way, so as to violate the rule of law, because he did not have the calculations before him. It was reasonable for him to proceed as he did.

[48] The same reasoning applies here and I see no reason to depart from it.

D. *Failure to Include the Calculations in the Statement of Reasons*

[49] Algoma submits that the refusal to provide the detailed calculations as part of the statement of reasons amounts to a breach of procedural fairness or an instance of a failure to provide "adequate and intelligible reasons" in the context of *Vavilov* and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. Without the calculations, Algoma argues that the decision is neither transparent nor reviewable, as it is not possible to understand the reasoning process behind the determination of the margin of dumping. During oral argument, Algoma also indicated that it is unable to recreate the CBSA's calculations on its own without access to the requested documents.

[50] The same arguments were made and dismissed in *Canadian Hardwood* (at paras. 63-73 and 82-84). I see no reason to depart from those reasons. As mentioned earlier, not only was the duty of procedural fairness owed to Algoma set at a low threshold, but also throughout the administrative process, Algoma had access to the information on the record. Moreover, as this Court noted in *Canadian Hardwood*, the inclusion of the detailed calculations as part of the statement of reasons would invite a "line-by-line treasure hunt for error" on judicial review (*Canadian Hardwood* at para. 83, referring to *Vavilov* at para. 102). Keeping in mind that the final determination is based on a highly detailed and technical analysis of voluminous information and complex mathematical calculations, this Court would become entangled in detail of which it would not see the light.

[51] Algoma has failed to persuade me that the absence of the calculations in the statement of reasons renders the decision unreasonable or that it resulted in a breach of procedural fairness.

E. *Opinion that a PMS does not exist in Turkey*

[52] A PMS may be found to exist in respect of any goods of a particular exporter or of a particular country. As this Court noted in *Canadian Hardwood*, the SIMA and the SIMR do not provide a definition of what is a PMS (at para. 86). One must look to the SIMA Handbook, which provides a list of factors the President may consider to form the opinion that a PMS exists:

- government regulations such as price floors, price ceilings, production quotas, import and export controls;
- taxation policies;
- government support programs (financial or otherwise);

- the presence and activities of state-owned or state-controlled enterprises in the domestic market as suppliers or purchasers of the like goods (also including other state-owned or state-controlled enterprises such as financial institutions);
- the acquisition of production inputs or processing services that do not reflect market-based costs because they are acquired from suppliers which are state-owned or state-controlled or that are affected by government influence or control;
- significant volatility in economic conditions in the home market of the exporter;
- evidence of distorted input costs;
- any other circumstances which may or may not be the result of government intervention, in which normal market conditions or patterns of supply and demand do not prevail.

(SIMA Handbook, s. 5.2.2.9)

[53] As this Court noted in *Canadian Hardwood*, at paragraph 92, the determination of whether a PMS exists is highly contextual. It involves a process that is both technical and factually intensive, which falls within the CBSA's expertise.

[54] In determining the normal values of any goods under section 15 of the SIMA, the President shall not take into account any sale of like goods for use in the country of export that, in the opinion of the President, do not permit a proper comparison with the sale of the goods to the importer in Canada due to the existence of a PMS (SIMA, paragraph 16(2)(*c*)). Depending on the circumstances, the CBSA will then refer to sections 19 or 29 of the SIMA to calculate normal values.

[55] When determining the cost of production for the purposes of paragraph 19(*b*) of the SIMA, the CBSA refers to paragraph 11(1)(*a*) of the SIMR, which in turn, incorporates section 11.2 of the SIMR into the analysis of paragraph 19(*b*) of the SIMA. Where the President

is of the opinion that a PMS distorts the cost of inputs used in the production of the subject goods sold to the importer, the costs of the inputs will be determined pursuant to subsection 11.2(2) of the SIMR.

[56] In the present case, the CBSA calculated the normal value for heavy plate produced in Turkey by Erdemir using paragraph 19(*b*) of the SIMA. Pursuant to paragraph 19(*b*) of the SIMA, the normal value is the aggregate of the cost of production of goods, a reasonable amount for administrative selling and all other costs, and a reasonable amount for profits. As the President did not form the opinion that a PMS existed in Turkey during the period of investigation, there was no need to determine the costs of the inputs pursuant to subsection 11.2(2) of the SIMR.

[57] Algoma submits that it was unreasonable for the President of the CBSA to decide that a PMS did not exist in Turkey, and that this conclusion affected the determination of the normal values. Algoma advances the following grounds: (1) the CBSA limited its analysis of government support programs to countervailable subsidies; (2) the CBSA did not have evidence to support its conclusion that market volatility was mitigated; (3) the CBSA failed to consider the cumulative and incremental effects of the various PMS factors; and (4) the CBSA improperly limited its PMS analysis to Turkey.

(1) Government Support Programs

[58] Algoma submits that the CBSA improperly limited its analysis of government support programs to countervailable subsidies that may be available under those programs. Algoma argues that the CBSA's administrative record does not include any evidence that the CBSA investigated or examined government support programs in Turkey beyond the questions asked in the initial RFIs to the government of Turkey and to Erdemir. Likewise, the administrative record does not show that the CBSA investigated the specific programs highlighted in Algoma's complaint. The CBSA thus failed to assess the distorting effect that such programs were having on the heavy plate market and on Erdemir. Algoma advances that government policies and programs may affect a marketplace and domestic prices without resulting in countervailable subsidies.

[59] Algoma further argues that the CBSA improperly relied on the results of its corrosion-resistant steel sheet (COR2) subsidy investigation, instead of conducting one for heavy plate specifically. The COR2 investigation related to a different product, different exporters and covered a different period of investigation. As a result, the CBSA improperly conflated these types of subsidies.

[60] I am not persuaded by Algoma's arguments.

[61] The CBSA's treatment of government support programs in Turkey must be understood within the overall context of the PMS determination. The CBSA considered the government

support programs identified by Algoma in its complaint, which included the COR2 subsidy investigation, as part of its analysis of government support programs for heavy plate. In its complaint, Algoma provided a list of 35 "subsidy programs" that the CBSA was investigating with respect to Turkish corrosion-resistant steel. It submitted that all programs could also affect plate production. It specifically "request[ed] that the CBSA investigate the listed subsidy programs as part of its [PMS investigation] to determine if they contribute to a [PMS] for plate" (Applicant's Public Record, Vol II at 310, para. 338).

[62] Algoma also submitted in its complaint that "as plate and corrosion-resistant steel are both flat-rolled products, the subsidy rate is likely very similar between the two products. As such, the CBSA's all-others rate in corrosion-resistant steel is an appropriate subsidy estimate" (Applicant's Public Record, Vol. II at 310, para. 340).

[63] Having made the request that these programs be considered for the purposes of the investigation, Algoma cannot reasonably fault the CBSA for having done so.

[64] In any event, the CBSA explained in the statement of reasons why it considered the results of its recent subsidy investigation into COR2 from Turkey. It noted that it had terminated the investigation in respect of goods from three participating Turkish exporters due to insignificance and that the amount of subsidy for all other exporters in Turkey was determined at 3.6% (statement of reasons at para. 88). The CBSA indicated that the amount of subsidy determined for a COR2 exporter "would include any subsidy provided to the hot-rolled steel or other upstream material producers if it was also determined that the producer or exporter of

subject or like goods had benefited from this subsidy, in whole or in part" (statement of reasons at para. 89). The CBSA had concluded that "the subsidy amount for Turkish producers [was] not substantial enough to directly indicate that the government actions resulting from these policies or government supports [had] contributed to Turkey's hot-rolled steel or other upstream steel material sectors in any significant manner" (statement of reasons at para. 90).

[65] In *Canadian Hardwood*, this Court held that it was not unreasonable for the President of the CBSA, when considering government support programs in the context of a PMS determination, to only consider those already assessed under the subsidy investigation (at para. 106).

[66] While the CBSA's reasons focus mainly on the COR2 subsidy investigation, they also demonstrate that the CBSA considered and reviewed several Turkish economic policies (statement of reasons at paras. 85-87). The CBSA's analysis of these policies is found in greater detail in the PMS memorandum (AGC's Confidential Record, Vol. I at 246-251). Furthermore, in the statement of reasons, the CBSA points to the record which demonstrates that it explored with the government of Turkey through RFIs the existence of legislation, regulations, programs, and incentives that could have an influence on the heavy plate industry in Turkey (Applicant's Public Record, Vol. II at 350-366, Vol. III at 369-753). Even if the statement of reasons does not specifically refer to all of the information received during the course of the investigation, it cannot be assumed that it was not considered by the CBSA. It is trite law that decision makers need not refer in their reasons to each and every piece of evidence before them, as they are presumed to have considered the whole record (*Manitoba Métis Federation Inc. v. Canada (Energy*

Regulator), 2023 FCA 24 at para. 195, citing *Simpson v. Attorney General of Canada*, 2012 FCA 82 at para. 10).

[67] Algoma has not identified any particular program having a significant impact on the heavy plate industry in Turkey nor has it demonstrated that the CBSA's consideration of the government support programs was unreasonable.

(2) Volatility of the Turkish Market: Hedging and Derivative Instruments

[68] As previously mentioned, another factor the CBSA may consider in forming the opinion that a PMS exists is whether there is "significant volatility in economic conditions in the home market of the exporter" (SIMA Handbook at s. 5.2.2.9).

[69] Algoma submits that the CBSA erred when it concluded that Turkish companies had been able to minimize the effects of volatility by using derivative instruments to hedge against currency fluctuations or by denominating domestic sales in US Dollars (USD). At the hearing, Algoma argued that Erdemir was asked multiple times over the course of the investigation what measures it took to mitigate the effects of currency volatility, but never demonstrated that it used any currency derivatives, nor proved whether customers paid in USD or in Turkish Lira. Therefore, based on the lack of evidence, Algoma contends that the CBSA's conclusion was unreasonable.

[70] In the statement of reasons, the CBSA indicates that it analyzed the volatility in the economic conditions in Turkey's domestic market, namely the rapid currency depreciation, high inflation, high interest rates, and contraction in the domestic heavy plate industry during the period of investigation. While acknowledging that the extent of the volatility had the potential to bring instability and unpredictability in the market, the CBSA noted that companies in Turkey had been able to take measures to minimize such volatility by denominating domestic sales in USD and using derivative instruments to hedge against currency or interest rate fluctuations. The CBSA also took into account some of the measures implemented by the government of Turkey to mitigate the currency risk and inflation pressure in response to currency depreciation (statement of reasons at paras. 82-83).

[71] To assess the impact of the volatile economic conditions in Turkey, the CBSA compared the actual domestic prices of heavy plate supplied by Erdemir in the response to the CBSA's Dumping RFI with price data in the Black Sea, and Northern and Southern European regions. The CBSA found that the domestic price of heavy plate in Turkey did not deviate much from the other three benchmark regions and that, overall, the potential impact of the market conditions in Turkey on domestic prices for heavy plate was not material enough to demonstrate a price distortion (statement of reasons at para. 95; AGC's Confidential Record, Vol. I at 263).

[72] The record demonstrates that Erdemir denominated domestic sales in USD. The CBSA explored this issue in depth during the investigation, through numerous RFIs. Erdemir consistently explained that its functioning account currency was USD, that its domestic sales were in USD and that clients could pay in USD or Turkish Lira at the equivalent rate on the date

of payment (AGC's Confidential Record, Vol. I at 182, 202-205, 207, 210 and 213). Erdemir further explained during the hearing that denominating domestic sales in USD was a form of hedging and amounted to such a type of insurance.

[73] The CBSA's reference to derivative instruments must be also construed in its context. It was not directed specifically to Erdemir, but to companies in Turkey in general. Furthermore, contrary to Algoma's submission, there was evidence in the record that during the period of investigation, the Central Bank of Turkey had taken steps to support financial stability through the use of foreign exchanges through transactions in Borsa Istanbul Derivatives Markets (Applicant's Public Record, Vol. I at 395, Answer to question 16).

[74] The SIMA Handbook specifies that the volatility must be significant. I agree with the AGC that what must be considered is not the volatility itself, but the effect of the volatility. The CBSA was satisfied that the overall impact on domestic prices for heavy plate was not substantial (statement of reasons at para. 84).

[75] Algoma has not demonstrated that it was unreasonable for the CBSA to conclude, based on the information in the record, that both Erdemir and the Turkish government had taken measures to minimize the effects of this volatility.

(3) Cumulative Nature of the Factors

[76] Algoma submits that the CBSA looked at the PMS factors in isolation and not cumulatively. It argues that it was unreasonable for the CBSA to ignore the incremental effects of the various PMS factors acting together.

[77] While based on different facts, the same argument was raised and dismissed in *Canadian Hardwood* (at paras. 128-132). In the present case, and similarly to *Canadian Hardwood*, the CBSA was clearly aware that Algoma alleged the cumulative or combined effect of the PMS factors, but was not satisfied that they supported the existence of a PMS (statement of reasons at para. 79; Applicant's Confidential Record, Vol. II at 369; Applicant's Public Record, Vol. I at 55). Algoma has not demonstrated how and why, based on the record, a combination of the factors supported the existence of a PMS in Turkey.

(4) Limiting the Analysis to the Country Instead of the Exporter

[78] Algoma contends that the CBSA erred when concluding to the absence of a PMS only in regards to the government of Turkey. It should have investigated and made a determination specifically for Erdemir. Algoma argues that it was unreasonable to consider the government of Turkey and Erdemir as synonymous entities.

[79] While the statement of reasons does not offer a separate opinion on the existence of a PMS with respect to Erdemir, I am satisfied that the CBSA investigated and considered both Turkey and Erdemir in regards to the existence of a PMS. Given the CBSA's finding that

Erdemir was the only heavy plate exporter in Turkey, there was inevitable overlap in the assessment of the existence of a PMS at the country level and at the exporter level.

[80] That said, the record and the statement of reasons show that the CBSA was alive to the fact that a PMS could exist in respect of any goods of a particular exporter or of a particular country (statement of reasons at para. 75). The CBSA sent RFIs and supplemental RFIs to Erdemir requesting information pertaining to the existence of a PMS. It considered Erdemir's practice of denominating domestic sales in USD when considering the impact of the volatility in economic conditions in Turkey. The CBSA accepted that in the PMS context, Erdemir was state-owned or state-controlled (statement of reasons at para. 92). It compared various input costs for Erdemir for the purposes of assessing Algoma's allegations of input cost distortion (statement of reasons at para. 93). To assess the effect and impact of the market conditions on the domestic price of heavy plate, the CBSA conducted a comparison between the actual domestic prices of heavy plate supplied by Erdemir in the RFI responses with price data from the other three benchmark regions (statement of reasons at para. 95).

[81] Based on the evidence in the record, I am not convinced that the CBSA committed a reviewable error in this regard.

[82] To summarize, I am satisfied that the CBSA's conclusion on the absence of a PMS in Turkey is based on the consideration of the relevant factors and on the evidence in the record. Its analysis is comprehensive and responsive to Algoma's arguments and the particular context of SIMA investigations.

[83] Ultimately, Algoma takes issue with the fact that the CBSA did not conduct a perfect investigation. However, this is an unreasonable standard. While Algoma may disagree with the CBSA's conclusion, it is not the role of this Court on judicial review to reassess the factors and reweigh the evidence (*Vavilov* at para. 125).

V. Conclusion

[84] Despite Algoma's counsel's able submissions, I have not been persuaded that the decision fails to meet the required threshold of reasonableness as set out in *Vavilov* or that there was a breach of procedural fairness. Therefore, for the above reasons, I would dismiss the application for judicial review with costs. In accordance with the agreement reached by the parties, a total amount of $4,000 will be paid by Algoma to the AGC and Erdimir.

"Sylvie E. Roussel"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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