CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, July 3, 1997

Review No.: RR-97-003

IN THE MATTER OF requests to expand the coverage of the finding of the Canadian International Trade Tribunal made on December 11, 1992, in Inquiry No. NQ-92-002, concerning bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater, and frames thereof, originating in or exported from Taiwan and the People's Republic of China.

REASONS FOR DECISION

BACKGROUND

On May 15, 1997, the Canadian International Trade Tribunal (the Tribunal) issued a notice of review of its finding made on December 11, 1992, in Inquiry No. NQ-92-002, concerning bicycles, assembled or unassembled, with wheel diameters of 16 inches (40.64 cm) and greater, and frames thereof, originating in or exported from Taiwan and the People's Republic of China.[1] A number of parties that made submissions to the Tribunal requesting a review and seeking continuation of the finding also made requests which, if granted by the Tribunal, would have the effect of expanding the coverage of the finding to include bicycles and frames that are not currently subject to anti-dumping duties. More specifically, the Tribunal received requests to amend the finding:

1) to include bicycles with wheel diameters exceeding 14 inches;

2) to include all bicycles that compete with Canadian-made 16-inch bicycles;

3) to include imports of frames from Mexico and Brazil; and

4) either to remove the exclusion for imports with a selling price exceeding CAN$325 FOB Taiwan or People's Republic of China or to increase this amount to CAN$500 or CAN$600 FOB Taiwan or People's Republic of China.

The Tribunal was of the view that each of these requests raised a preliminary issue with respect to the Tribunal's power or jurisdiction to grant any or all of these requests and decided to address them prior to issuing the review questionnaires. The Tribunal set out directions for the filing of submissions with respect to these matters in its notice of review. Subsequently, the Tribunal received submissions in support of certain of these requests from the Canadian Bicycle Manufacturers' Association[2] (CBMA). The Tribunal received submissions in opposition to some or all of these requests from a number of parties, including The Canadian Association of Specialty Bicycle Importers, Specialized Bicycle Components of Canada, Inc., the Taiwan Bicycle Exporters' Association, the Retail Council of Canada, Dynacraft Industries, Inc., Shun Lu Bicycle Company, British Steel Canada Inc., the Embassy of Brazil and the Embassy of Mexico.

1. *Finding*, December 11, 1992, *Statement of Reasons*, December 29, 1992.
2. The Canadian Bicycle Manufacturers' Association was one of the complainants in the proceedings that lead to the Tribunal's inquiry.

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POSITION OF PARTIES

The CBMA made submissions in respect of three of the four requests. It expressed no views with respect to frames imported from Mexico or Brazil. Counsel for the CBMA submitted that the wording of subsections 76(2) and (4) of the *Special Import Measures Act*[3] (SIMA) provides the Tribunal with wide jurisdiction as to the subject matter that it may consider in a review and as to the order that it may make as a result of such a proceeding.

Counsel for the CBMA submitted that this case could be distinguished from certain decisions[4] of the Anti-dumping Tribunal (the ADT) and the Canadian Import Tribunal (the CIT), in which the ADT and the CIT made explicit no injury findings with respect to goods that parties sought to have reconsidered in review proceedings. Counsel submitted that, contrary to these findings, the Tribunal's finding of December 11, 1992, was not a finding of no injury. Rather, it was a finding described in section 3 of SIMA and, therefore, pursuant to the language of subsection 76(2) of SIMA, the Tribunal could review its finding and, by necessary implication, any aspect of it, including the scope of the finding and the exclusion set out in it.

Counsel for the CBMA submitted that the Tribunal's power under subsection 76(2) of SIMA to rehear "any matter" and under subsection 76(4) to amend a finding after a review "as the circumstances require" allows it to vary the scope of an order or finding by widening or narrowing it. Counsel submitted that the Tribunal does not have to make a formal finding of no injury in order to grant an exclusion and that the granting of an exclusion is something within the Tribunal's discretion under subsection 43(1) of SIMA.[5] Furthermore, counsel submitted that, when the conditions which justify an exclusion cease, the Tribunal should be able to remove the exclusion, either partially or totally, without the necessity of a new inquiry.

With respect to the specific exclusion at issue, counsel for the CBMA submitted that the goods subject to the exclusion are clearly within the preliminary determination of dumping made by the Deputy Minister of National Revenue (the Deputy Minister). Counsel submitted that the goods intended to be exempt from anti-dumping duties were "high range" goods. However, inflation and other factors have led to an increase in the threshold between lower and higher price range bicycles, such that goods which were not supposed to be included in the exclusion now technically fall within it and are avoiding anti-dumping duties. Returning to the issue of the Tribunal's power to rehear matters under subsection 76(2) of SIMA, counsel

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3. R.S.C. 1985, c. S-15.

4. *Polypropylene Homopolymer and Copolymer Resins Originating in Belgium, France, the Netherlands, the United Kingdom and the United States of America*, Anti-dumping Tribunal, Review No. ADT-3B-79, *Review Finding* and *Statement of Reasons*, November 16, 1983; *Stainless Steel Plate, Originating in or Exported from Belgium, the Federal Republic of Germany, France, Italy, Sweden and the United Kingdom*, Anti-dumping Tribunal, Review No. R-2-84, *Review Finding* and *Statement of Reasons*, August 22, 1984; and *Citric Acid and Sodium Citrate Produced by or on Behalf of Miles Laboratories, Inc. in the United States of America*, Canadian Import Tribunal, Review No. R-8-85, *Review Finding* and *Statement of Reasons*, October 18, 1985.

5. Citing *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America*, Article 1904 Binational Panel, NAFTA Secretariat - Canadian Section File No. CDA-93-1904-09, *Opinion and Panel Decision*, July 13, 1994; and *Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of America*, Article 1904 Binational Panel, NAFTA Secretariat - Canadian Section File No. CDA-94-1904-04, *Decision of the Panel*, July 10, 1995.

submitted that, in Review No. RR-94-003,[6] the Tribunal stated that, in a review, the Tribunal has the power to hear any matter considered by it in the course of the original inquiry and that the exclusion at issue was clearly considered by the Tribunal in the original inquiry. Counsel also submitted that the Deputy Minister could update appropriate duty levels for goods that were subject to the original preliminary determination and subsequently excluded from the Tribunal's finding.

Turning to the issue of goods that compete within Canadian-made 16-inch bicycles, counsel for the CBMA noted that the Tribunal had dealt with this matter in another respect in *Zellers Inc.* v. *The Deputy Minister of National Revenue*.[7] Counsel submitted, however, that the Tribunal is not bound, as it is in appeals, by the strict language of the initial finding and that the Tribunal should consider submissions as to whether it is appropriate to modify the scope of its original finding so as to curtail the circumvention that occurred in *Zellers*. Counsel submitted that, in other words, SIMA (particularly subsection 76(2) of SIMA) cannot leave the Tribunal powerless to resolve problems arising from the language that it used in its initial finding as to the scope of the goods subject to the finding.

As noted, the Tribunal received a number of submissions from parties opposed to some or all of the requests received. Many of the arguments made by these parties were similar. The following summarizes the submissions without attribution to any particular party.

With respect to the first two requests, namely, to include bicycles with wheel diameters exceeding 14 inches or, in the alternative, to include all bicycles that compete with Canadian-made 16-inch bicycles, parties submitted that subsections 76(2) and (4) of SIMA must be read in the context of SIMA as a whole. In this regard, it was submitted that these subsections do not grant the Tribunal the jurisdiction to expand the class of goods as defined by the Deputy Minister. Put differently, the jurisdiction to define the class of goods rests with the Deputy Minister and not the Tribunal, and both of these requests would result in a redefinition of the class of goods and, thus, an excess of jurisdiction. As matters relating to the goods included or not included in the class of goods specified by the Deputy Minister would not have been heard by the Tribunal in the first place, there is nothing for the Tribunal to hear in this regard in this review.

With respect to the inclusion of Brazil and Mexico in this review, it was submitted that this is also a matter within the Deputy Minister's jurisdiction. It was noted that the ADT had expressly stated that it did not have the authority in a review to extend a finding to a country not mentioned in the preliminary determination that gave rise to the finding that was under review.[8] It was submitted that the inclusion of Brazil and Mexico would also be contrary to a number of Articles of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of GATT 1994*[9] (the WTO Anti-dumping Agreement), including Articles 2, 3 and 5, and, therefore, would be inconsistent with Canada's international obligations. The possible application of referrals to the Deputy Minister under section 46 of SIMA was also raised, and it

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6. *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and [the Former] Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan*, Canadian International Trade Tribunal, *Order*, May 2, 1995, *Statement of Reasons*, May 16, 1995.
7. Appeal No. AP-94-351, January 25, 1996.
8. *Supra* note 4, *Polypropylene Resins* at 4.
9. Signed at Marrakesh on April 15, 1994.

was submitted that this provision was confined to inquiries under section 42 and, thus, does not apply to reviews under section 76.

Finally, with respect to the issue of considering the inclusion of bicycles with a selling price exceeding CAN$325 FOB Taiwan or People's Republic of China, it was submitted that, under section 3 and subsection 76(2) of SIMA, the Tribunal only has jurisdiction to review goods that were found to have caused injury or retardation or to have been threatening to cause injury. It was submitted that support for this submission can be found in the CIT's decision in *Citric Acid*, where the CIT stated that section 76 of SIMA made clear that it could only review findings of injury.[10] In addition, the ADT, in *Stainless Steel Plate*, stated that the analogous section in the *Anti-dumping Act*[11] to section 76 of SIMA contemplates a review of a finding "as it relates to goods made subject to the imposition of anti-dumping duties, not goods free of such levy.[12]" In this case, the Tribunal did not make a finding of injury or threat of injury in respect of the goods falling within the exclusion. Therefore, the Tribunal cannot now conduct a review with respect to such goods or include them in any amended finding.

It was also submitted that, in the original inquiry, the Tribunal made a finding of no injury or threat of injury against the subject bicycles sold above the price set out in the exclusion. This can be found in the Tribunal's statement that, "[g]iven the low volume of sales by the [domestic industry] and the low degree of price sensitivity, the Tribunal is of the opinion that material injury has not been suffered in the high price range segment of the market.[13]" If the Tribunal were to grant this request, it would have to assume that dumping had occurred with respect to goods that had not been subject to the finding for the past five years because dumping proceedings were terminated in respect of these goods in light of the original finding. If the domestic industry wishes protection from allegedly dumped higher-priced bicycles, it should seek such protection through the initiation of a new case.

Furthermore, it was noted that the CBMA did not cite any authority in which the Tribunal has used its review power to grant the type of amendment being requested.

In reply, counsel for the CBMA repeated their submission that the Tribunal did not make a finding of no past, present or future injury, as contemplated by SIMA, in respect of the excluded products. Rather, the Tribunal made an injury finding, of which the exclusion was a part, that is, an element of the description of the goods covered. Therefore, this is not a case where there is an attempt being made to reverse a finding of no injury, but rather a request to consider amending the finding so that the exclusion more accurately reflects economic and commercial realities that have changed the intended exclusion in real terms.

With respect to the first and second requests, counsel for the CBMA submitted that the class of goods, as defined by the Deputy Minister, referred to bicycles that are described by a nominal wheel diameter of 16.0 inches and greater. Counsel submitted that the fact that the Deputy Minister assessed anti-dumping duties against bicycles with a wheel diameter of 15.5 inches in *Zellers* indicates that the Deputy Minister was of the view that such bicycles were within the class of goods defined in the preliminary determination. In these circumstances, the Tribunal must, at the very least, hear evidence on the issue of the scope of the original finding, before deciding whether or not clarification of the original finding is required.

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10. *Supra* note 4, *Citric Acid* at 4.
11. R.S.C. 1970, c. A-15, repealed by S.C. 1983-84, c. 25, s. 110.
12. *Supra* note 4, *Stainless Steel Plate* at 6.
13. *Supra* note 1 at 21.

ANALYSIS

With respect to the first two requests, i.e. whether the Tribunal has the jurisdiction to include bicycles with wheel diameters exceeding 14 inches or, in the alternative, to include all bicycles that compete with Canadian-made 16-inch bicycles in an amended finding, the Tribunal observes that it is well established that the formulation or definition of the subject goods for the purpose of the preliminary determination is within the Deputy Minister's jurisdiction.[14] In *DeVilbiss (Canada) Limited, Phelan and Smith Limited and Waffle's Electric Limited* v. *Anti-dumping Tribunal*,[15] the Federal Court of Appeal held that, in an inquiry under section 42 of SIMA, the Tribunal has the jurisdiction to interpret the class of goods or clarify the meaning of certain words in the Deputy Minister's definition, where the Tribunal has difficulty in ascertaining the exact scope of the goods to which the preliminary determination applies or where it finds that there is an ambiguity in the Deputy Minister's definition. The Federal Court of Appeal stated that "[t]o do so does not ... necessarily result in a redefinition of the class of goods formulated by the Deputy Minister.[16]" Therefore, in an inquiry under section 42, the Tribunal must accept the class of goods as defined by the Deputy Minister, subject to any interpretation or clarification that it may make in the course that inquiry.

In Review No. RR-94-003, the Tribunal discussed the implication of the holding in *DeVilbiss* for reviews under section 76 of SIMA. The Tribunal stated that it would only have the power to reconsider the definition of the class of goods in a review if it had heard the matter in the original inquiry. The Tribunal found that it had not done so and, thus, that it did not have jurisdiction to rehear a matter that it had not heard in the original inquiry. In this case, it is clear to the Tribunal that the matter of the definition of the class of goods was not "heard" by the Tribunal in the original inquiry and, thus, it does not have jurisdiction in this review to consider any issues relating to either interpreting or clarifying the definition of the subject goods.

The Tribunal also agrees with the parties that submitted that SIMA does not provide the Tribunal with jurisdiction to expand the class of goods as defined by the Deputy Minister. To do so would mean that the Tribunal could expand the class of goods to include goods that were never subject to the Deputy Minister's dumping investigation, and SIMA clearly does not provide the Tribunal with the jurisdiction to include such goods in an order or finding.

With respect to the CBMA's submission that the Deputy Minister's decision to assess anti-dumping duties on bicycles with a wheel diameter of 15.5 inches in *Zellers* is evidence that such bicycles were intended to be covered by the preliminary determination, the Tribunal notes that it ruled on appeal in that case that these goods were not goods of the same description as the goods subject to the Tribunal's finding in Inquiry No. NQ-92-002.

Turning to the request to include Brazil and Mexico, the Tribunal agrees with the argument that the inclusion or non-inclusion of goods from a specific country within the class of subject goods is a matter within the Deputy Minister's jurisdiction. Again, there is no basis in SIMA that provides the Tribunal with the power to include goods that were never part of the Deputy Minister's investigation. The Tribunal also agrees that to include Brazil and Mexico in this review would be inconsistent with Canada's obligations under the WTO Anti-dumping Agreement. In addition, the Tribunal is of the view that section 46 of SIMA

14. *Supra* note 6 at 32 and, in particular, the cases cited in note 64 of that decision.
15. [1983] 1 F.C. 706.
16. *Ibid.* at 714.

cannot be used to make referrals to the Deputy Minister in a review under section 76, as it specifically relates to an inquiry under section 42 only.

The final request that the Tribunal must consider is whether the Tribunal can either remove the exclusion for bicycles with a selling price exceeding CAN$325 FOB Taiwan or People's Republic of China or increase this amount to CAN$500 or CAN$600 FOB Taiwan or People's Republic of China. The Tribunal is of the view that consideration of this issue first requires it to come to a view as to what the Tribunal meant by this exclusion, as reflected in its statement of reasons in Inquiry No. NQ-92-002. The Tribunal notes that, in its discussion under the heading "Exclusion: Bicycles," the Tribunal expressly stated that it was of the opinion that "material injury has not been suffered in the high price range segment of the market.[17]" As such, the goods covered by this exclusion cannot be said to be goods that are described in section 3 of SIMA, and proceedings against these goods would have been terminated at the time of the Tribunal's finding pursuant to section 47 of SIMA. The Tribunal is of the view that it cannot subsequently review goods that it has previously found not to be injurious to the domestic industry.

The Tribunal went on, in its statement of reasons in Inquiry No. NQ-92-002, to establish the price of FOB country of origin of CAN$325 per bicycle to differentiate bicycles in the high price range from bicycles in the low and medium price ranges. In doing so, the Tribunal more specifically identified those subject goods that were in the high price range and that were not causing material injury. Therefore, in this case, the Tribunal can only review whether the finding in Inquiry No. NQ-92-002 should be rescinded or continued, with or without amendment, in the context of bicycles from Taiwan or the People's Republic of China that have an FOB selling price of CAN$325 or less, and the subject bicycle frames originating in or exported from Taiwan and the People's Republic of China.

Accordingly, for these reasons, the Tribunal is of the view that it does not have jurisdiction to grant the first three requests and that, furthermore, it does not have jurisdiction to grant the fourth request in this case.

Lyle M. Russell
Lyle M. Russell
Member

Charles A. Gracey
Charles A. Gracey
Member

17. *Supra* note 1 at 21.

ADDITIONAL COMMENTS OF MEMBER RUSSELL

For the reasons set out above, I agree with my colleague, Member Gracey, that, as the Tribunal found that material injury had not been suffered in the high price range segment of the market, the Tribunal cannot, in this review, consider whether the exclusion of bicycles with a selling price exceeding CAN$325 FOB Taiwan or People's Republic of China should be removed or whether the amount should be increased. I would, however, like to make some additional comments with respect to both the implications of making an exclusion and the limitations on the Tribunal's powers in a review that flow from section 3 of SIMA.[18]

It is my view that, in granting an exclusion, the Tribunal, whether it expressly states so or not, is making a determination that the goods that are covered by the exclusion are not contributing to any injury that may have been suffered by the domestic industry. If, for instance, certain subject goods in a particular market segment are excluded because there is no production of like goods in Canada, it must follow that imports of such goods could not contribute to injury to domestic producers.

With respect to the relationship between section 3 of SIMA and the Tribunal's review powers under subsections 76(2) and (4), it is my view that the Tribunal only has jurisdiction to review goods that were found to have caused injury or retardation or to have been threatening to cause injury. In the absence of a finding of injury, section 3 does not apply to these goods and, therefore, they cannot be subject to a review under subsection 76(2), which is limited to findings described in section 3. In this regard, I agree with the statement by the CIT in *Citric Acid*[19] that section 76 makes clear that the Tribunal can only review findings of injury. I also agree that the statement of the ADT in *Stainless Steel Plate* in respect of the analogous provision to section 76 in the *Anti-dumping Act*, i.e. that it contemplates a review of a finding "as it relates to goods made subject to the imposition of anti-dumping duties, not goods free of such levy," is equally applicable to section 76. In this case, the Tribunal did not make a finding of injury or threat of injury in respect of the goods falling within the wording of the exclusion. Therefore, the Tribunal cannot now conduct a review of such goods nor include them in any amended finding.

Lyle M. Russell
Lyle M. Russell
Member

18. Only section 3 is mentioned, as most Tribunal findings deal with dumping and this is the primary duty liability provision in this respect. However, in my view, these comments are equally applicable to sections 4 to 6.

19. I note that the CBMA did not cite any authority in which the Tribunal has used its review power to grant the type of amendment which the Tribunal is being asked to consider.

DISSENTING VIEWS OF MEMBER CLOSE

I agree with my colleagues in respect of the reasons for not granting the first three requests that the Tribunal has considered in this matter. With respect to the fourth request, however, it is my view that the Tribunal, in this review, can consider whether the appropriate price point for differentiating high-priced bicycles is still CAN$325 FOB Taiwan or People's Republic of China. I agree with my colleagues that the Tribunal does not have the jurisdiction to remove the CAN$325 exclusion altogether, as that would entail including in the review order goods (high-priced bicycles) that the Tribunal excluded from its finding at the time of the inquiry. The CAN$325 figure was chosen by the Tribunal as an indicator to distinguish certain goods (high-priced bicycles) that it wished to exclude from its finding. The Tribunal was clear that the CAN$325 figure was not a characteristic inherent to high-priced bicycles, but was merely "[b]ased on information available to the Tribunal on the average costs and markups that are ordinarily applied to import purchases.[20]" It would appear, therefore, that the Tribunal left the door open for future panels to revisit the price point and to consider, on the basis of existing market conditions, whether the "the average costs and markups that are ordinarily applied to import purchases[21]" still provide a price point of CAN$325.

In drafting exclusions from an injury finding, the Tribunal must define those goods covered by the exclusion in a precise enough manner to enable the Deputy Minister to enforce the finding. This is not always easy to do. Without jurisdiction to rehear the matter of whether or not a particular indicator chosen by the Tribunal to differentiate between excluded and included goods is still appropriate, I am concerned that the Tribunal's inclination to grant exclusions may be diminished. The result may well be perverse. The Tribunal's decisions could become overly encompassing so as to guard against changes that may occur in the marketplace in the future. I am not persuaded that Parliament intended that the Tribunal, in reviewing a finding, would not be able to reconsider the continuing validity of indicators, chosen by the Tribunal itself, to describe excluded goods.

Patricia M. Close
Patricia M. Close
Presiding Member

20. *Supra* note 1 at 21.
21. *Ibid.*