



Judicial Review Not Remedy to Correct Margin of Dumping in Canada

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In [Angang Steel v. President of the CBSA](#), 2020 FCA 67, Angang Steel Company Limited and Angang International Trade Corporation (collectively Angang) brought an application for judicial review before the Federal Court of Appeal (the court) under paragraph 96.1(1)(b) of the *Special Import Measures Act* (SIMA). Angang challenged the final determination of dumping made by the president of the Canada Border Services Agency (the president) with respect to corrosion-resistant steel sheet imported from China, Chinese Taipei, India and South Korea, arguing that the margin of dumping (i.e., the difference between the price in the market of the exporting country or “normal value,” and the price in the Canadian market or “export price”) specified in the president’s final determination was too high.

The central issue in the application was whether the court’s jurisdiction to review final determinations extends to the size of the margin of dumping that was found or, alternatively, whether it is limited to the finding of dumping itself.

In concluding that the applicable margin of dumping for Angang was 53.3 per cent of the export price, the president relied on a ministerial specification, made under s. 29(1) of SIMA, establishing normal values and export prices for the alleged dumped corrosion-resistant steel sheets in question. The president took this approach after concluding that Angang’s responses to the request for information were insufficient to allow for a more situation-specific determination.

Angang submitted that the margin of dumping should not have been established in this way. However, Angang did not dispute the finding of dumping itself or argue that its margin of dumping was “insignificant” (defined under SIMA as less than two per cent of the export price of the goods).

In brief, the issue under review was whether the court has jurisdiction to set aside the president’s final determination under s. 41(1)(b)(i) of SIMA if the margin of dumping, while not “insignificant,” would be less than the amount specified. Following a textual, contextual and purposive analysis of the relevant SIMA provisions, Angang’s application was dismissed by the court.

Textual Analysis

In two recent decisions, based on a former version of s. 41 of SIMA, the court held that the president’s final determination of dumping cannot be set aside where a reduction in the margin of dumping would still result in such margin not being insignificant (see *Seah Steel Corporation v. Evraz Inc. NA Canada* 2017 FCA 172 and *JFE Steel Corporation v. Evraz Inc. NA Canada* 2018 FCA 111) Angang used a textual

argument to submit that because the wording of s. 41 of SIMA had since changed, this precedent no longer applied.

The change is essentially that, while under the former wording the president made a final determination of dumping with regard to a specific *country*, the current provision shifts the focus to a particular *exporter*.

The court held that, notwithstanding this change, the threshold of the final determination remains the same. That is, the president must determine a) if goods are being dumped, and if so, b) whether the margin of dumping is insignificant. It is only if the president has concluded that the margin of dumping was two per cent or greater that he or she can make a final determination of dumping. Since the same process now applies to an exporter instead of a country, the court concluded that it can only review the final determination of dumping and not the margin of dumping as determined by the president.

Contextual and Purposive Analysis

The court also examined the relevance of the margin of dumping established by the president under s. 41(1)(b)(i) of SIMA. It found that this determination simply allows the president to conclude whether the dumping is insignificant and has no impact on any anti-dumping duties that may be imposed.

The Canadian International Trade Tribunal (the CITT) is responsible for deciding whether any dumped goods have caused injury or threaten to cause injury to the domestic market; only if it decides in the affirmative will anti-dumping duties be applied. Further, even following an affirmative injury determination by the CITT, it is not the margin of dumping determined by the president that will apply. Rather, s. 55 of SIMA provides that the president must designate an officer who will oversee determining the margins of dumping that will be used to establish the appropriate quantum of antidumping duties.

Since it is clear to the court that Parliament did not intend that the margin of dumping, as determined by the president, be used to impose any anti-dumping duties, there is no legal impact associated with revising a margin of dumping from one amount to another to the extent both are not insignificant.

Conclusion

Following its textual, contextual and purposive analysis of the relevant provisions of SIMA, the court found that there is no basis to allow Angang's application for judicial review, as the final determination of dumping would be the same regardless of the applicable margin of dumping (if not insignificant). Conversely, the court would have been in a position to set such a decision aside if the margin of dumping had instead been insignificant.

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