



[2022] 2 F.C.R. D-12

ANTI-DUMPING

Judicial review of notice of final determination (Final Determination) of President of Canada Border Services Agency (CBSA) issued in January 2021 — CBSA issuing public statement of reasons for Final Determination (DONP 2020 IN) (Statement of Reasons), in which it explained that CBSA terminated dumping, subsidizing investigations in respect of certain decorative, other non-structural plywood originating in or exported from People’s Republic of China — Dumping investigation terminated against certain of the respondents (Zero-Rated respondents) — Subject goods exported by Zero-Rated respondents representing fraction of volume of decorative, other non-structural plywood imported into Canada by Chinese exporters investigated by CBSA — CBSA identified 765 potential Chinese exporters/producers of subject goods based on CBSA import documentation, information provided by applicants — Applicants arguing that CBSA departed from rule of law because margins of dumping calculations not before President — Stating that CBSA’s failure to provide these calculations giving rise to breach of procedural fairness pursuant to *Special Import Measures Act*, R.S.C., 1985, c. S-15 (SIMA), s. 96.1(2)(b) or to reviewable error pursuant to s. 96.1(2)(d) — Also contending that CBSA’s termination of dumping investigation with respect to respondents unreasonable because it resulted from CBSA’s failure to find that particular market situation (PMS) existed in respect of goods of respondents or in respect of goods of People’s Republic of China — Respondent Attorney General of Canada positing, *inter alia*, no breach of procedural fairness, not necessary for President to review CBSA’s actual calculations — President found that PMS did not exist, determined normal values of goods for Zero-Rated respondents pursuant to SIMA, s. 29(1) with respect to all goods exported where no information was supplied in respect of cost of production — Applicants seeking judicial review on grounds pertaining to President’s approach to determining whether PMS existed in context of its dumping investigations — Advancing four main reasons why unreasonable for President to decide that PMS did not exist in decorative plywood industry in China : (1) CBSA limited “government support programs” to “countervailable subsidies”; (2) CBSA ignored non-cooperating exporters’ amounts of subsidy when assessing “government support programs”; (3) CBSA erroneously found log prices in China not distorted; (4) CBSA did not examine cumulative effect of factors — Issues whether failure on part of President to include calculations in Statement of Reasons giving rise to breach of procedural fairness; whether failure on part of CBSA to provide calculations to President or to include calculations in Statement of Reasons rendering Final Determination unreasonable; whether reasonable for President to conclude that PMS did not exist — No breach of procedural fairness herein — Final Determination having to be read with Statement of Reasons, confidential Dumping Memorandum — In present application, calculations not part of record, not before decision maker, not provided to applicants — Duty of procedural fairness owed to applicants set at low threshold, given access they have to exporters’ information, strict statutory timelines imposed on President to conclude dumping investigations — Applicants not allowed to rely on calculations in support of application for judicial review — Court can only look at evidence that was before decision maker — Calculations not part of record, not before President — Final Determination based on internally coherent, rational chain of analysis, justified in relation to facts and law constraining President — Absence of calculations in Statement of Reasons not rendering decision inadequate or unintelligible — In most administrative tribunals, calculations or details of investigation not before decision maker — What is before decision maker usually report summarizing factual findings, methodology used to investigate or determine issue, reach conclusion — This exactly what was done here — Not unreasonable for President to rely on memoranda prepared by officers within CBSA, without need to

see detailed calculations — Nothing in SIMA requiring President to have calculations when making preliminary, final determinations — However, nothing preventing President from requesting access to such calculations — Here, President’s discretion not exercised in arbitrary way — President of CBSA not failing to provide adequate, intelligible reasons — Inclusion of spreadsheets with extensive data inviting “line-by-line treasure hunt for error”, reweighing of evidence — Not unreasonable for President to form opinion that PMS did not exist in respect of goods of Zero-Rated respondents — Reasonable for President, in context of determining whether PMS might exist, to have limited his analysis of government support programs to countervailable subsidies — President’s analysis not limiting remedial effect of PMS provisions — Reasonable for CBSA to interpret terms “government support programs” in manner consistent with way subsidies treated under SIMA — President considered all information contained in record on government support programs — Although SIMA, s. 30.4(3) (which prohibits CBSA from considering non-actionable subsidies when assessing amount of subsidy) not directly applicable to PMS determination, reasonable for President to follow same methodology, restrictions when assessing government support programs — Even though majority of Chinese plywood producers assigned amount of subsidy by ministerial specification, reasonable for President to conclude that sole existence of those subsidies insufficient to form opinion that PMS existed — When amounts of subsidy not reflecting amounts of subsidy actually received, reasonable for CBSA not to take into consideration amounts of subsidy specified for non-cooperating exporters when assessing whether PMS existed in China — SIMA not requiring President to request additional information from applicants — Nothing in SIMA Handbook imposing specific positive obligations on President to gather information, verify submissions — Within President’s discretion to request further information — Reasonable for President to consider evidence available on record, not request further information from applicants, exporters or third countries — Applicants not explaining how, why, on evidentiary record, combination of factors supported existence of PMS — President assessed each factor, considered all of available evidence, explained why he did not form opinion that PMS existed in China — Application dismissed.

CANADIAN HARDWOOD PLYWOOD AND VENEER ASSOCIATION V. CANADA (ATTORNEY GENERAL) (A-52-21, 2023 FCA 74, juge Rivoalen, J.A., public reasons for judgment dated April 5, 2023, 45 pp. + 29 pp.)