UNITED STATES-CANADA BINATIONAL PANEL REVIEW

REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA	)	USA-89-1904-02

Before: Alberger
Brown
Flavell
Graham
Kassinger

MEMORANDUM OPINION AND ORDER
REGARDING SCOPE DETERMINATION

I. PROCEDURAL HISTORY

In 1977, the U.S. Department of the Treasury [1] published T.D. 77-222, an antidumping duty order covering parts for self- propelled bituminous paving equipment from Canada. In 1981, Fortress Allatt, Ltd. ("Allatt") requested that the Department of Commerce ("Commerce") clarify whether attachments to such equipment were included in "parts for self-propelled bituminous pavers." The original petition filed by Blaw Knox Construction Equipment Corporation ("Blaw Knox") et al. referred to "Replacement Parts for Bituminous Paving Equipment Exported from Canada" (emphasis added). The 1981 scope investigation focused on a list of 7,000 replacement

[1] As of January 2, 1980, the Department of Commerce assumed responsibility for administering Title VII of the Tariff Act of 1930.

parts provided by Blaw Knox. Based on the record, Commerce concluded that attachments were beyond the scope of the order.

On July 18, 1984, Allatt [2] requested a further clarification of T.D. 77-222. Allatt argued that the order did not encompass either (i) replacement parts for paving equipment attachments, or (ii) any replacement parts for Allatt-manufactured paving equipment. Commerce did not respond to this petition. Allatt renewed its request by letter dated July 7, 1988, and Commerce initiated a scope determination proceeding. Blaw Knox objected to both prongs of Allatt's 1988 request. On January 23, 1989, Commerce determined that under T.D. 77-222, replacement parts for Allatt-manufactured equipment were of the "class or kind" of product described in the antidumping duty order and as such were within its scope. Commerce further determined that replacement parts for attachments should not be included within the scope of the order.

On March 16, 1989, Allatt filed a request for Panel review of the determination. [3] On April 14, Blaw Knox filed a complaint, alleging that Commerce's scope determination was not supported by substantial evidence or in accordance with law insofar as Commerce excluded replacement parts for attachments. On April 17, Allatt filed a complaint, alleging inter alia that Commerce erred in its determination that T.D. 77-222 covers replacement parts for Allatt-manufactured self-propelled bituminous pavers.

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[2] See Panel Opinion Regarding Motions to Dismiss Reviews at 5-6 for a discussion of the corporate history of Fortress Allatt, Ltd. and for a more complete procedural history of this Panel review.

[3] Article 1904 of the U.S.-Canada Free Trade Agreement provides for Panel Reviews in place of judicial review. See infra Part II.

II. STANDARD OF REVIEW

The United States-Canada Free Trade Agreement ("FTA") provides in certain circumstances for binational panel reviews to supplant judicial review of antidumping and countervailing duty

determinations rendered by the administering authorities in the importing country (either the United States or Canada). [4] Under Article 1904.3, this Panel shall apply the standard of review prescribed by "Article 1911 and the general legal principles [5] that a court of the importing party otherwise would apply. . . ." Since the United States is the importing country in this proceeding, Article 1911 of the FTA directs the Panel to apply the standard of review mandated in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended. Thus, under the FTA, the Panel must look to section 516A(b)(1)(B) of the Tariff Act of 1930 for the applicable standard of review and the common law for the appropriate legal principles.

Section 516A(b)(1)(B) of the Tariff Act of 1930, codified at 19 U.S.C. { 1516a(b)(1)(B)

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[4] Article 1904.1, 19 U.S.C. { 1516a(g)(2) (1989 Supp.). The FTA contains some specific exceptions to the Panel's exclusive grant of jurisdiction, as follows: (i) neither the U.S. nor Canada requests review pursuant to Article 1904; (ii) the determination at issue is the direct result of previous judicial review or the parties commenced judicial review before the effective implementation date of the FTA (January 1, 1989); or (iii) binational panels cannot review issues of constitutional law or requests for injunctive or declaratory relief. See Article 1904.11; 19 U.S.C. { { 1516a(g)(3), (4) (1989 Supp.).

[5] Article 1911 defines "general legal principles" as "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

(1982), provides that a "court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Matsushita Elec. Ind. Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). The United States Supreme Court has explained that substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20 (1966).

When determining whether an agency's application and interpretation of a statute is in accordance with law, a court need not conclude that "[t]he agency's interpretation [is] the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.11 (1984); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). The court need only find that the agency adopted a reasonable interpretation. Chevron, 467 U.S. at 845.

Following these principles and Article 1904.3 of the FTA, the Panel is precluded from substituting its judgment for that of Commerce. Id., Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Corning Glass Works v. U.S. Int'l Trade Comm'n, 799 F.2d 1559, 1565-66 (Fed. Cir. 1986); Matsushita, 750 F.2d at 933. The panel cannot reverse Commerce's finding merely because it would have come to a contrary factual conclusion or interpreted a statute differently, so long as Commerce acted reasonably. If the Panel concludes that Commerce

reasonably interpreted the statutes and evidence, it must affirm the challenged findings.

Within the reasonableness standard, Commerce can neither expand nor narrow the scope of an antidumping or countervailing duty order. Rather, it can only clarify and explain the scope of the orders. IPSCO, Inc. v. United States, 715 F. Supp. 1104, 1107 (Ct. Int'l Trade 1989) (citing Royal Bus. Machines v. United States, 507 F. Supp. 1007, 1013-14 (Ct. Int'l Trade 1980), aff'd 669 F.2d 692 (C.C.P.A. 1982)). Thus, in its 1989 determination that the Panel reviews today, Commerce purported simply to clarify that the scope of T.D. 77-222 included replacement parts for self-propelled bituminous pavers manufactured by Allatt, but did not include replacement parts for attachments.

III. REPLACEMENT PARTS FOR ATTACHMENTS

Commerce's 1981 clarification order found that paver attachments were beyond the scope of the antidumping duty order. Commerce defined attachments as:

> merchandise not generally included in original equipment at the time of entry of the attachment, not necessary to the operation of the completed machine, and attachable to the completed machine without extensive machine disassembly.

Blaw Knox's original petition requested an investigation of "replacement parts for self-propelled bituminous pavers." Blaw Knox here submits that attachments become part of the self-propelled paving equipment by the time "replacement parts" for the attachments are required, and thus the replacement parts for attachments are covered by the antidumping duty order. That

argument may have some merit. However, Commerce followed a different approach, and the Panel can only inquire whether Commerce's 1989 scope determination is reasonable.

> The 1981 scope clarification order reasoned that:
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> > Attachments serve a different function from such integral parts, enhancing the performance of a completed machine rather than forming part of the original machine. This difference in function. . . leads us to exclude attachments from the class or kind of merchandise covered by the finding. Components which could be attached to a completed machine, and which were not vital to the machine's functioning, were not considered at the time of the original fair value investigation for there were no imports of such merchandise from Canada; attachments were not included in the parts lists submitted to the Treasury Department and the International Trade Commission ("ITC") by the petitioner. The Treasury Department and the ITC based their subsequent determinations only on parts integral to completed machines.
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> 46 Fed. Reg. 47,807 (Sept. 30, 1981).

Id. Thus, we proceed from the premise that the original investigation and the antidumping duty order did not encompass paver attachments. [6] Commerce could not modify the antidumping order to include attachments; such articles could only be subject to antidumping duties following a new investigation and under a separate order.

In this case, Commerce extended the logic of its 1981 determination by reasoning that replacement parts for attachments are outside the Order because the attachments themselves are not necessary to the operation of the self-propelled bituminous paving equipment. The nature of that distinction between the basic equipment and the attachment was not deemed to be altered by the installation of the attachment, and subsequent replacement of a part or parts on the

[6] See T.D. 77-222; Brief for Investigative Authority at 31 n.76, USA 89-1904-02.

attachment. Likewise, installation of a replacement part for an attachment does not transform that replacement part into a replacement part for the basic equipment.

In short, we find that Commerce's determination that replacement parts for attachments are not covered by T.D. 77-222 is reasonable and supported by the record.

IV. REPLACEMENT PARTS FOR ALLATT PAVING EQUIPMENT

The second determination under review is whether Commerce reasonably concluded that the antidumping duty order included replacement parts for self-propelled bituminous pavers manufactured by Allatt.

The submissions of counsel suggest that presently there is no U.S. manufacturer of replacement parts for Allatt equipment. It appears that the U.S. manufacturers of paving equipment only make replacement parts for their own equipment and do not make replacement parts for Allatt or any other paving equipment. Blaw Knox offered evidence that replacement parts designed for one make of paver could be modified and used on another. That evidence, though, neither establishes inter-changeability nor constitutes a critical factor in our decision.

Against that background, the Department reasoned as follows:

> When we cannot make a determination based on the documentation above, we use four additional criteria. These criteria are the physical characteristics of the merchandise, the uses for which the merchandise is imported, the expectations of the ultimate purchasers, and the channels of trade in which the merchandise moves.

> For Allatt replacement parts, however, we found it unnecessary to resort to these criteria because Allatt specifically limits its requests to replacement parts. In its original request dated July 11, 1984, it described them as follows:
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> > "The parts in issue are those used to replace parts of paving machines manufactured and sold by Allatt under its own name. . ."
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> The fact that Allatt replacement parts may arguably be useful only for Allatt machines does not remove them from the class or kind of merchandise included in the scope of the finding. Such parts are nevertheless replacement parts, which we have defined as those parts "integral to completed machines". Moreover, the fact that the initial Treasury finding focused on three U.S. manufacturers does not require that replacement parts for additional manufacturers' machines be excluded. Therefore, we concluded that Allatt replacement parts are within the scope of the finding.

See United States Department of Commerce Memorandum Regarding Scope Exclusion Requests, from Richard W. Moreland, Acting Director of Office Antidumping Compliance to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance at 3, released to the parties January 22, 1989 (January 19, 1989).

Allatt concedes that the articles in question are replacement parts for paving equipment, the articles specified in T.D. 77-222. It contends, however, that the order does not encompass replacement parts for Allatt pavers, because (i) in 1977 neither the Treasury Department's nor the U.S. International Trade Commission's ("ITC") investigations (and, ipso facto, determinations) embraced such parts, and (ii) there currently is no domestic industry that could claim injury by reason of sales of replacement parts for Allatt pavers.

Allatt's interpretation of the 1977 determinations is unsupported by the record, and its injury argument is irrelevant. We have been presented with no credible evidence that either the 1977 Treasury dumping determination or the ITC injury determination purposefully were circumscribed in a manner that excluded parts for Allatt pavers. Treasury's published

determination simply specified "Parts for Self-Propelled Bituminous Paving Equipment." See T.D. 77-222. Likewise, both the prevailing and dissenting views of the Commissioners discussed Allatt's parts generally, without distinguishing among Allatt's brand-specific parts. See generally Parts For Self-Propelled Bituminous Pavers, USITC Pub. 824, Inv. No. AA1921-166 (July 1977). The proposition that Allatt parts for Allatt original equipment -- but no other Allatt parts -- were excluded from the order simply is not sustainable. We cannot read into T.D. 77-222 a company-specific determination that neither agency addressed nor made itself.

Moreover, Allatt's real complaint seems to be that the U.S. industry was not and is not being injured by Allatt's replacement parts for its own machines. That may or may not be true, but the argument is misdirected. A scope review is not the place to investigate injury allegations, and Commerece correctly ignored Allatt's suggestions in this regard. Commerce determines the class or kind of merchandise that is subject to an investigation and any resulting antidumping duty order; it is not authorized to make injury determinations. On the other hand, it is not for the ITC to define the "class or kind" of merchandise subject to investigation; rather, the ITC determines the domestic "like products" of the imported merchandise. Thus, in 1977, the ITC found that an industry producing products "like" the imported class of replacement parts (from which the Treasury Department had not excluded Allatt parts) was injured. The ITC did not make multiple like product findings, somehow isolating domestic production of parts for Allatt machines and finding no injury with respect to such separate like products.

Allatt's injury argument perhaps should be addressed to the ITC in the context of a changed circumstances review of the outstanding order. See 19 U.S.C. { 1675(b)(1). In such a

proceeding, Allatt presumably could press its lack-of-injury argument generally; or more narrowly, it could attempt to convince the ITC that parts for Allatt machines constitute a separate like product, and that T.D. 77-222 should be modified or revoked because no U.S. industry producing such a product is incurring material injury.[7] We cannot speculate on the merits of such a case; we can only affirm here that Commerce correctly rejected Allatt's invitation to issue a new scope determination on such a basis.

In sum, T.D. 77-222 covers "replacement parts for self-propelled bituminous pavers" from Canada. Commerce applied the order as it is written, and found that "replacement parts" for Allatt machines are still "replacement parts" as that term has always been defined, first by Treasury and now by Commerce. We affirm Commerce's determination as being reasonable and supported by substantial evidence.

V. CONCLUSION

For the reasons stated, the Department of Commerce's scope determination is hereby affirmed.

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[7] See, e.g., Liquid Crystal Display Television Receivers from Japan, USITC Pub. 2042, Inv. No. 751-TA-14 (1987) (finding by divided vote that liquid crystal display televisions were not separate like products from domestically produced cathode ray televisions.) For ITC determinations holding that some like products within a class or kind of merchandise are not being injured by reason of imports, see, e.g., Antifriction Bearings (other than Tapered Roller Bearings) and parts thereof from the Federal Republic of Germany, et al., USITC Pub. No. 2185 (May 1989); and Certain Valves, Nozzles, and Connectors of Brass from Italy, USITC Pub. No. 1649 (February 1985), 7 ITRD 1442.

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