

Before: NAFTA Chapter 19 Dispute Resolution Panel

In the Matter of:)

Final Scope Ruling on)
Galvak, S.A. de C.V. Merchandise)

USA-98-1904-05

Antidumping Order on)
Circular Welded Non-Alloy Steel Pipe)
From Mexico)

Panel: Lawrence J. Bogard, Panel Chair
Jeffery Cyril Atik
Lucia Ojeda Cardenas
Hernan Garcia Corral
Arthur Rosett

MEMORANDUM OPINION AND ORDER

MAY 16, 2003

Jeffery M. Winton and Christopher M. Ryan of Shearman & Sterling, Washington, D.C., for Galvak, S.A. de C.V.

Roger B. Shagrin of Shagrin Associates, Washington, D.C., for Allied Tube & Conduit Corporation and Wheatland Tube Company.

John D. McInerney, Elizabeth C. Seastrum, and D. Michael Stroud, Jr. of the Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, D.C., for the Investigating Authority.

OPINION AND ORDER OF THE PANEL

This Binational Panel now has before it the Redetermination On Remand, Circular Welded Non-Alloy Steel Pipe from Mexico: Scope Determination – Galvak (“Redetermination”) issued by the U.S. Department of Commerce (“Commerce”) on March 7, 2003. The Redetermination was issued pursuant to this Panel’s Memorandum Opinion and Order dated November 19, 2002 (“Panel Opinion”).^{1/}

The Panel concludes that it cannot affirm the Redetermination, and it therefore again remands the subject Scope Ruling to Commerce for further action consistent with this decision.

Fundamentally, the Scope Ruling must be remanded because the Redetermination does not make a specific scope determination with respect to the products that Galvak intends to export. It is true that the Redetermination does make a general observation that mechanical tubing “is not within the scope of the [Antidumping Duty O]rder,” Redetermination at 1, 17. This observation, however, merely restates the pertinent language of the Order, which excepts mechanical tubing from the scope of the Order, as follows:

The products covered by [this Order] are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or

^{1/} This matter involves a challenge by Galvak S.A. de C.V. (“Galvak”) to a Scope Ruling in which Commerce declined Galvak’s request to determine that the tubular products that Galvak intended to export to the United States were not within the scope of the Order. See Scope Ruling Memorandum to Joseph A. Spetrini (DAS, Enforcement Group III) from Richard Weible (Office Director, AD/CVD Enforcement Group III) (Nov. 19, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 9 (hereinafter referred to as the “Scope Ruling”). The facts of the underlying matter are set forth in the Panel Opinion, familiarity with which is assumed.

end finish (plain end, beveled end, threaded, or threaded and coupled). [. . .]

All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this order, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.^{2/}

Commerce's broad observation that mechanical tubing is not covered by the Order in question does not constitute a specific determination as to the products intended to be exported by Galvak. The Redetermination never goes beyond this generalized statement and expressly fails to make a determination with respect to Galvak. Commerce does state that "[W]e also determine that some tubing produced by Galvak to ASTM A-787 may be within the scope of the Order. Specifically, tubing which conforms to the dimensions and characteristics of ASTM A-53 and fence tubing is included within the scope of the Order," but this merely articulates a framework for determining the scope of the Order, which the Department might intend to apply to Galvak's products. Commerce's statement that "some" of Galvak's tubing "may" be within the Order's scope is mere speculation, it is not a reviewable determination.

Because it does not go beyond an articulation of a framework based on "dimensions and characteristics of ASTM A-53 and fence tubing" the Redetermination fails to answer the fundamental question: Do the products that Galvak intends to export meet the dimensions and characteristics of ASTM A-53 and fence tubing? Rather, the Redetermination merely concludes:

^{2/} Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico, and Venezuela, 57 Fed. Reg. 49453(November 2, 1992) (emphasis added).

based upon the evidence on the record, the Department cannot determine whether Galvak's galvanized pipe, manufactured to ASTM A-787 specifications, is in fact mechanical tubing or standard pipe. We are enclosing the specifications for standard pipe which cannot be considered mechanical tubing. If Galvak's merchandise is manufactured to these standards, it is in-scope merchandise and covered by this Order.

Redetermination at 17 (emphasis added).

If the Department "cannot determine" whether Galvak's products are mechanical tubing or standard pipe, then the Department has not made any determination reviewable by this Panel. Indeed, the Department has not made any determination at all. Merely appending dimensional standards to the Redetermination does not resolve the question. The Scope Ruling must therefore be remanded to enable Commerce to make a specific determination as to the products Galvak intends to export.

In remanding the Scope Ruling a second time, the Panel reminds Commerce that the Panel's first decision in this matter concluded that the exclusionary language of the Order "dictates that Commerce begin its analysis of the Order's scope with the rebuttable presumption that mechanical tubing – the merchandise subject to the Scope Ruling – is outside the scope of the Order and then consider such record evidence as may demonstrate that specific mechanical tubing products are covered by the Order." Panel Opinion at 3. The ASTM A-53 standards appended to the Redetermination describe acceptable ranges for physical characteristics – dimension, weight, test pressure, minimum wall thickness – which a product must meet in order to qualify as meeting the standard. Merely citing the dimensional standards set forth in ASTM A-53 for standard pipe does not comprise record evidence to rebut the presumption created by the Order's exclusionary language, however, nor does it, as

the Panel directed, “demonstrate that specific mechanical tubing products are covered by the Order.”

The Order’s scope language expressly recognizes that mechanical tubing represents an excluded subset of a broader set of pipes and tubes, all having the same physical description. The Order thus presumes that in-scope standard pipe and excluded mechanical tubing have the same or overlapping physical characteristics, including dimensional characteristics. Reference to an industry standard that describes dimensional ranges – a physical characteristic – cannot constitute proper ground for determining, even in the abstract, whether a tubing product is covered by the Order or is excluded as mechanical tubing. Commerce’s conclusion that all products falling within the physical parameters described in ASTM A-53 are covered by the Order creates a presumption that mechanical tubing of standard pipe dimensions is covered by the Order despite the Order’s exclusionary language. The Redetermination’s reliance on ASTM A-53 thus perpetuates the presumption that specific mechanical tubing products are covered by the Order unless demonstrated otherwise. This, of course, is the presumption that was rejected in the Panel Opinion.

Finally, the Department’s statement that it “cannot determine” whether Galvak’s products are “in fact” mechanical tubing or standard pipe “based upon the evidence on the record” evidences Commerce’s failure to fulfill its responsibility under the statute. Commerce is the fact-finder in this instance and it is the Department’s responsibility to develop a record sufficient to make a determination. Rather than rely on ASTM physical dimension standards, Commerce should more appropriately have focused its energies on developing the facts concerning each product that Galvak proposed to export. The relevant facts concern the analytic factors described in Diversified Products v. United States, 572

F.Supp. 883 (Ct. Int'l Trade 1983) and Commerce's own regulations, 19 C.F.R. 351.225(k). Rather than develop its Administrative Record on a product-specific basis, however, the Department endeavored to articulate a broad rule concerning all mechanical tubing. Consequently, as it concedes, the Department now lacks sufficient record evidence to make a determination.

Commerce unquestionably had the authority to develop its record adequately. In view of the Department's request for a 45-day extension of time to complete its redetermination – which the Panel granted – the Department also had ample opportunity to solicit additional product-specific facts.^{3/} Thus, if upon remand, the Department concluded that its evidentiary record was insufficient, it could have reopened the record to solicit additional evidence specific to Galvak's products. Alternatively, the Redetermination could have been based on "Facts Available" as authorized by 19 U.S.C. § 1677e(a). In this context, the Panel notes that Galvak submitted very little factual information about the specific products it intends to export, beyond a reference to "green house tubing" as an example of one possible use for its products. Rather, Galvak chose to rely on its legal argument that all products conforming to mechanical tubing standards are excluded from the Order. In any event, the Department has not met its responsibility if, in its own judgment, it cannot make a determination because the evidence in its administrative record is inadequate.

The Panel hereby remands the Scope Determination to Commerce with instructions to (1) determine based on record evidence whether the Order applies to the specific mechanical

^{3/} The Panel initially granted Commerce 60 days to complete the Redetermination, followed by a 45-day extension. Both the Redetermination and an accompanying motion urged the Panel to permit the parties to submit comments on the Redetermination. This suggests that Commerce itself viewed the Redetermination as an incomplete work-in-progress.

tubing products intended to be exported by Galvak, and (2) take such other action as may be appropriate, not inconsistent with the decision.

The results of this remand shall be filed with the NAFTA Secretariat within 30 calendar days. Requests for extension of this due date will not be viewed sympathetically.

So Ordered.

Signed in the Original By:

May 16, 2003

Lawrence J. Bogard, Panel Chair
Lawrence J. Bogard, Panel Chair

May 16, 2003

Jeffery Cyril Atik
Jeffery Cyril Atik

May 16, 2003

Hernan Garcia Corral
Hernan Garcia Corral

May 16, 2003

Lucia Ojeda Cardenas
Lucia Ojeda Cardenas

May 16, 2003

Arthur Rosett
Arthur Rosett