

Before: NAFTA Chapter 19 Dispute Resolution Panel

In the Matter of:

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

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

USA-98-1904-05

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

MEMORANDUM OPINION AND ORDER

June 7, 2004

Jeffrey 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 Rachael E. Wenthold, 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 Third Redetermination on Remand, Circular Welded Non-Alloy Steel Pipe from Mexico: Scope Determination – Galvak (“Third Redetermination”) issued by the U.S. Department of Commerce (“Commerce”) on February 19, 2004. The Third Redetermination was issued pursuant to this Panel’s Memorandum Opinion and Order dated December 18, 2003 (“Third Panel Opinion”).^{1/}

In the Third Panel Opinion, we affirmed the Department’s definition of mechanical tubing, articulated in Commerce’s Second Redetermination on Remand as a “specialized, made-to-order product,” for purposes of identifying mechanical tubing products that are excluded from the scope of the Antidumping Duty Order here at issue. We nonetheless remanded with instructions that the Department apply this definition to the products which Galvak stated it intends to import, as identified in Galvak’s scope ruling request and detailed in the administrative record.

Prior to the Third Panel Opinion, Galvak had supported its claim that the products it intended to import were beyond the scope of the Order with the assertion that all such products met the industry standard for mechanical tubing, ASTM A-787, and that any product meeting the A-787 standard was “out of scope.” Because Commerce did not articulate a

^{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 Antidumping Duty Order (“Order”) against Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to the Final Determination of Sales at Less than Fair Value, Certain Circular Welded Non-Alloy Steel Pipe from Korea, 57 Fed. Reg. 49453 (Nov. 2, 1992). The facts of the underlying matter are set forth in the Panel’s previous Opinions, familiarity with which is assumed.

definition for mechanical tubing until the Second Redetermination, Galvak had not previously been afforded a clear opportunity to discuss its products in the context of Commerce’s definition. Our third remand provided such an opportunity for Galvak to direct the Department’s attention to record evidence of those non-dimensional physical characteristics of Galvak’s products which might support a finding that those products were “specialized, made-to-order.” On February 19, 2004 the Department issued its Third Redetermination on Remand, in which it concluded that some Galvak A-787 products are mechanical tubing (and hence not within the Order’s scope) while other Galvak A-787 products are standard pipe (and therefore in-scope).^{2/} We affirm the Department’s Third Redetermination.

We note that Commerce’s Third Redetermination concludes that all of the Galvak A-787 products which the Department expressly considered and which have physical dimensions that overlap the physical dimensions for standard pipe set out in the pertinent ASTM A-53 standards are covered by the Order. (Third Redetermination at 15 and Appendix 1). Our prior decisions rejected any analysis of the Order’s scope that presumes all products which meet the A-787 standard, but which also have dimensions falling within the parameters of the A-53 standard to be in-scope standard pipe. The “specialized, made-to-order” definition which we affirmed in our Third Opinion requires the Department to examine all of the characteristics of Galvak’s A-787 product (to the extent such qualities are described in the record), and not to limit its analysis merely to a dimensional overlap with the A-53 standard.

^{2/} The Third Redetermination was issued after Commerce afforded the parties an opportunity to review and comment upon a draft Redetermination.

The Department is bound to apply its “specialized, made-to-order” definition to the facts on the record. But in so doing, the Department need not reach beyond the record, nor must the Department resort to surmise as to the non-dimensional characteristics of Galvak’s products. The Department’s responsibility is to consider any characteristic of Galvak’s product identified in the record that suggests the product is “specialized, made-to-order.” The ultimate assessment of such characteristics is an exercise well within the Department’s expertise – to which the Panel owes substantial deference.

In this case, despite the opportunity afforded by a third remand, the administrative record contains little information beyond physical dimensions upon which Commerce could determine whether Galvak’s products are “specialized, made-to-order.” This is so even though Galvak was (1) aware of the Panel’s previous decision affirming Commerce’s definition of “mechanical tubing,” and (2) had been granted an opportunity by Commerce to review and comment on a draft of the third Redetermination. It is not the responsibility of the Department to compensate for inadequate information about Galvak’s product in the record. We therefore conclude that Commerce has properly brought its expertise to bear on the evidence brought before it.

In our most recent Opinion, we instructed the Department to consider the significance of a protective organic coating to be applied to some of Galvak’s products, as this non-dimensional physical characteristic appeared potentially probative of a “specialized, made-to-order product.” In its Third Redetermination, the Department describes its consideration of this characteristic, including its observation that non-metallic coatings are commonly used on standard pipe (Third Redetermination at 9). The Department concludes on that ground that

the presence of a protective organic coating does not foreclose a finding that a specific product is standard pipe. We defer to the Department's expertise.

Galvak asserts that all of its intended imports are manufactured in response to customer orders and are therefore "made-to-order." We are not persuaded by this argument for the simple reason that the Department's mechanical tubing definition has two distinct components: (1) specialized and (2) made-to-order. Galvak's manufacture of a specific product in response to a specific customer order might satisfy one prong of the Department's definition of mechanical tubing (though the Second Redetermination suggests "made-to-order" denotes more than that), but this alone is not sufficient. Galvak must also show, based on the administrative record, that in cases where its products' dimensions conform to the A-53 standard, the products are "specialized." Galvak has not satisfied the Department that its A-787 products are "specialized" when they also meet A-53 criteria for diameter and wall-thickness. Nor has it, for purposes of this Chapter 19 review, convinced this Panel that the specialized nature of its product is so evident, again based on the record, as to compel us to disturb the deference we owe to the Department's expertise.

The Department's scope determination depends on the description of the product Galvak intends to import as set forth in Galvak's scope ruling request and amplified through the administrative proceedings. Galvak's scope ruling request – that all products meeting the A-787 standard must be found to be out-of-scope – provided little basis to support a "specialized, made-to-order" finding in circumstances where a product is manufactured within A-53 dimensions. To the contrary, Galvak repeatedly asserted – even after the Panel affirmed Commerce's "specialized, made-to-order" definition of mechanical tubing – that the Department must exclude all A-787 products, regardless of dimensional overlap, merely

because such products meet the A-787 standard. Had Galvak identified more non-dimensional characteristics suggestive of a “specialized, made-to-order” nature, it might as well have persuaded the Department to make a finding that individual products (or even the entire group of intended imports) were mechanical tubing notwithstanding their conformity to A-53 standard dimensions. Absent such characteristics, the Department is permitted to make reasonable inferences consistent with a standard pipe determination. As such, the Department’s determination that those particular A-787 products which are manufactured to A-53 dimensions are standard pipe and hence “in scope” is reasonable and is supported by substantial evidence on the record.

Galvak is free, of course, to file future scope ruling requests with respect to specific products that meet both the A-787 and A-53 standards. Should Galvak do so, the Department shall apply its “specialized, made-to-order” definition (or show adequate reason why that definition should be abandoned) in examining Galvak’s product. In the meantime, the Department’s Third Redetermination on Remand is reasonable and adequately supported by evidence in the administrative record.

We affirm.

Signed in the Original By:

June 7, 2004

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Lawrence J. Bogard, Panel Chair

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