CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, October 2, 1996

Appeal No. AP-95-079

IN THE MATTER OF an appeal heard on January 26, 1996, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue dated March 22, 1993, with respect to a request for re-determination under section 58 of the *Special Import Measures Act*.

BETWEEN

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-95-079

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

This is an appeal under section 61 of the *Special Import Measures Act* (SIMA) from a re-determination of the Deputy Minister of National Revenue under section 59 of SIMA. In the re-determination, the respondent found, pursuant to subparagraph 4(*b*)(ii) of SIMA, that carbon steel welded pipe, imported by the appellant during the period in which it was found that Fornasa S.A. had violated its undertaking prior to the preliminary determination of dumping of certain carbon steel welded pipe originating in or exported from Brazil, Luxembourg, Poland, Turkey and Yugoslavia, was subject to anti-dumping duties. The issue in this appeal is whether the respondent correctly determined the normal value of the goods in issue released prior to the preliminary determination of dumping based on the finding that there had been a violation of an undertaking.

HELD: The appeal is dismissed. As a preliminary issue, the Tribunal considered whether it had the jurisdiction to hear the appeal. The Tribunal found that its jurisdiction under paragraph 55(*d*) of SIMA necessarily includes the determination of whether the goods in issue had been released during the period described in subparagraph 4(*b*)(i) or (ii) of SIMA and that it had the jurisdiction to determine whether the respondent had correctly determined the normal value of the goods in issue released prior to preliminary determination of dumping.

In considering whether the respondent correctly determined the normal value of the goods in issue released prior to the preliminary determination of dumping based on the finding that there had been a violation of an undertaking, the Tribunal interpreted the undertaking signed by Fornasa S.A. and, in particular, the phrase "sale of the subject goods to Canada through a subsidiary, branch, agent or other company" in the context of the intended effect of that undertaking and the relationship between the appellant and Fornasa S.A. The Tribunal found that the facts indicate that Fornasa S.A.'s involvement in the sales of the goods in issue to the appellant, at prices below those to which Fornasa S.A. agreed in its undertaking, was more than simply as a manufacturer of steel pipe and that, in effect, Fornasa S.A. sold the goods in issue to Canada through another company, Fasal S/A-Comércio e Indústria de Produtos Siderúrgicos, in violation of the undertaking. As a result, the Tribunal determined that the respondent had correctly determined the normal value of the goods in issue for the period prior to the preliminary determination of dumping.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 26, 1996
Date of Decision:	October 2, 1996

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Tribunal Members:	Raynald Guay, Presiding Member Robert C. Coates, Q.C., Member Desmond Hallissey, Member
Counsel for the Tribunal:	Shelley Rowe
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Michael Kaylor, for the appellant Anick Pelletier, for the respondent

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-95-079

J.B. MULTI-NATIONAL TRADE INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: RAYNALD GUAY, Presiding Member
ROBERT C. COATES, Q.C., Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] (SIMA) from a re-determination of the Deputy Minister of National Revenue under section 59 of SIMA. In the re-determination, the respondent found, pursuant to subparagraph 4(*b*)(ii) of SIMA, that carbon steel welded pipe, imported by the appellant during the period in which it was found that Fornasa S.A. (Fornasa) had violated its undertaking[2] prior to the preliminary determination of dumping of certain carbon steel welded pipe originating in or exported from Brazil, Luxembourg, Poland, Turkey and Yugoslavia under section 8 of SIMA (the retroactive period), was subject to anti-dumping duties. The issue in this appeal is whether the respondent correctly determined the normal value of the goods in issue released prior to the preliminary determination of dumping based on the finding that there had been a violation of an undertaking.

As a preliminary issue, counsel for the respondent submitted in her brief that the Tribunal's jurisdiction under section 61 of SIMA is limited to appeals concerning whether goods are of the "same description" as goods subject to a finding of the Tribunal, normal value and export price or the amount of a subsidy. Counsel submitted that the appellant is not challenging or contesting a re-determination made by the respondent with respect to the normal value of the goods in issue, nor is the appellant contesting whether the goods in issue are goods of the same description as goods to which a finding of the Tribunal applies or the export price. Rather, counsel submitted, the appellant is contesting the assessment of anti-dumping duties with respect to the importation of the goods in issue on August 22, 1991, and is, therefore, contesting the application of subparagraph 4(*b*)(ii) of SIMA, which is the authority to collect retroactive duties where an undertaking has been violated.

At the outset of the hearing, counsel were advised that the Tribunal would hear arguments concerning the Tribunal's jurisdiction under section 61 of SIMA to hear and decide this appeal and that it would reserve its judgment on this issue until the written decision and reasons were issued.

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1. R.S.C. 1985, c. S-15.
2. Section 2 of SIMA defines an "undertaking" to be an undertaking "to revise, in the manner specified in his undertaking, the price at which he sells the goods to importers in Canada" or "to cease dumping the goods in Canada."

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Counsel for the appellant argued that, pursuant to subsection 61(3) of SIMA, the Tribunal "may make such order or finding as the nature of the matter may require and ... may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken." He referred to the Tribunal's decision in *Walker Exhausts, Division of Tenneco Canada Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*,[3] in which it was found that, in giving the Tribunal the authority to "make such order, finding or declaration as the nature of the matter may require" in subsection 67(3) of the *Customs Act*,[4] "Parliament has conferred broad appellate jurisdiction on the Tribunal." Counsel submitted that the Tribunal's finding in that case applies equally to the provisions of subsection 61(3) of SIMA which are similarly worded and which expand the Tribunal's jurisdiction to declare what duty, or that no duty, is payable.

Counsel for the respondent submitted that, under section 55 of SIMA, a determination may be made concerning the following: (1) whether imported goods are subject to a finding; (2) the normal value; and (3) the export price or amount of subsidy. Pursuant to section 59, the respondent may, following a request for re-determination under section 58 or, as is the case in this appeal, following a decision of the Tribunal,[5] re-determine a determination made under section 55. Pursuant to section 61, a "person who deems himself aggrieved by a re-determination of the Deputy Minister made pursuant to section 59 ... may appeal therefrom to the Tribunal." She submitted that section 61 only permits appeals from re-determinations made under section 59 and that section 59 only permits re-determinations of determinations referred to in section 55, 56 or 57.

Counsel for the respondent further submitted that the re-determination at issue was made as a result of a remand of the Tribunal, directing the respondent to re-determine the normal value of the goods in issue. Therefore, in counsel's view, the subject of any appeal from this re-determination should be the normal value. However, counsel submitted, the appellant is challenging the assessment of anti-dumping duties under subparagraph 4(*b*)(ii) of SIMA, which is the authority to collect duties prior to a preliminary determination of dumping where an undertaking has been violated.

Section 61 of SIMA provides that a "person who deems himself aggrieved by a re-determination of the Deputy Minister made pursuant to section 59 with respect to any goods may appeal therefrom to the Tribunal." Section 59 provides that the respondent may, under certain circumstances, re-determine any determination or re-determination referred to in section 55, 56 or 57. Section 55 is the relevant provision for the purposes of this appeal. The following are the pertinent portions of section 55:

> the Deputy Minister shall cause a designated officer to determine, not later than six months after the date of the order or finding,
>
> (*c*) in respect of any goods released during the period described in subparagraph 4(*b*)(i) or (ii) or paragraph 5(*b*) or 6(*b*), whichever is applicable, that appear to be goods of the same description as goods described in the order or finding, whether the goods so released are in fact goods of the same description as goods described in the order or finding,

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3. Appeal No. AP-93-063, July 6, 1994.
4. R.S.C. 1985, c. 1 (2nd Supp.).
5. *J.B. Multi-National Trade Inc.* v. *The Deputy Minister of National Revenue for Customs and Excise*, Appeal No. AP-93-055, April 28, 1994.

> (*d*) the normal value and export price of or the amount of the subsidy on the goods so released, and
> (*e*) where section 6 or 10 applies in respect of the goods, the amount of the export subsidy on the goods.

Paragraph 55(*c*) of SIMA specifically refers to goods released during the period described in subparagraph 4(*b*)(i) or (ii). Subparagraphs 4(*b*)(i) and (ii), which deal with the assessment of provisional duties, read, in part, as follows:

> 4. There shall be levied, collected and paid on all dumped and subsidized goods imported into Canada
> (*b*) that were released
> (i) during the period commencing on the day the preliminary determination is made and ending on the day the Tribunal makes the order or finding referred to in paragraph (*a*), or
> (ii) in any case where an undertaking accepted by the Deputy Minister with respect to the goods has been violated, during the period commencing on the day the undertaking is violated or the ninetieth day preceding the day notice of termination of the undertaking is given pursuant to paragraph 52(1)(*f*), whichever is later, and ending on the day that subsection 8(1) becomes applicable to the goods.

In the Tribunal's view, the inclusion of the reference to subparagraph 4(*b*)(i) or (ii) or paragraph 5(*b*) or 6(*b*) in paragraph 55(*c*) of SIMA contemplates that the Tribunal's jurisdiction to determine whether imported goods are goods of the same description as goods described in a finding or order of the Tribunal is limited to imported goods that have been released during the period described in subparagraph 4(*b*)(i) or (ii) or paragraph 5(*b*) or 6(*b*). Therefore, the exercise of the Tribunal's jurisdiction under paragraph 55(*c*) necessarily includes the determination of whether the goods in issue were released during the period described in subparagraph 4(*b*)(i) or (ii) or paragraph 5(*b*) or 6(*b*).

While paragraph 55(*d*) of SIMA, which deals with normal value determinations, does not specifically refer to subparagraph 4(*b*)(i) or (ii) or paragraph 5(*b*) or 6(*b*), in the Tribunal's view, the phrase "goods so released" in paragraph 55(*d*) means goods released in the manner set out in paragraph 55(*c*), in other words, for the purposes of this appeal, goods released during the period described in subparagraph 4(*b*)(i) or (ii). Therefore, the Tribunal concludes that its jurisdiction to determine the normal value and export price of or the amount of the subsidy on the goods in issue under paragraph 55(*d*) is also limited to imported goods that were released during the period described in subparagraph 4(*b*)(i) or (ii). As a result, the exercise of the Tribunal's jurisdiction under paragraph 55(*d*) necessarily includes the determination of whether the goods in issue were released during the period described in subparagraph 4(*b*)(i) or (ii).

In this appeal, counsel for the appellant argued that the respondent had incorrectly assessed anti-dumping duties on the goods in issue released during the period described in subparagraph 4(*b*)(ii) of SIMA, that is, during the period after an undertaking was violated until the day on which the Tribunal makes an order or finding with respect to goods of that description. The respondent determined that subparagraph 4(*b*)(ii) was the applicable provision, based on its finding that the importation of the goods in issue constituted a violation of the undertaking given by another company, Fornasa.

Counsel for the appellant submitted that the anti-dumping duties should only have been assessed on the goods in issue released on or after the date of the preliminary determination of dumping. In the Tribunal's view, by making this argument, counsel, in essence, argued that the respondent incorrectly determined the normal value of the goods in issue which were found to have been released after the violation of an undertaking. It is counsel's view that the respondent should not have determined the normal value of and assessed anti-dumping duties on goods which were released before the preliminary determination of dumping. Rather, the respondent should have determined the normal value of and assessed anti-dumping duties only on goods released after the preliminary determination of dumping. Based on this interpretation, the Tribunal is of the view that it has the jurisdiction to determine whether the respondent correctly determined the normal value of the goods in issue.

Having found that it has the jurisdiction to consider the merits of this appeal, the Tribunal considered whether the respondent correctly determined the normal value of the goods in issue released prior to the preliminary determination of dumping based on its finding that there had been a violation of an undertaking.

An agreed statement of facts[6] signed by counsel for both parties was filed with the Tribunal prior to the hearing. The agreed statement of facts states the following:

1. On or about September 16, 1987, the Department of National Revenue (hereinafter the "Department") initiated a dumping investigation with respect to certain carbon steel welded pipe originating in or exported from several countries including Brazil.

2. On or about January 29, 1988, the investigation was suspended when undertakings were accepted from exporters representing substantially all of the exports to Canada.

3. Amongst those exporters who gave undertakings, two were located in Brazil. One of those two Brazilian signatories was Fornasa S.A. (hereinafter "Fornasa"). At that time, Fornasa was both a manufacturer and an exporter of the said pipe.

4. The Deputy Minister of National Revenue (hereinafter the "Respondent") decided that two Brazilian signatories violated their undertakings in early 1991 by selling the subject pipe to Canada at below the agreed to undertaking prices and, as a consequence, Respondent terminated the undertakings and made a preliminary determination of dumping as required by Section 52 of the *Special Import Measures Act* (hereinafter [SIMA]).

5. The preliminary determination was made on September 25, 1991, and the investigation was resumed.

6. A final determination was made on December 9, 1991. The Canadian International Trade Tribunal issued a full injury finding respecting Brazil on January 23, 1992.

7. A review to establish normal values and export prices for importations of subject goods entered into Canada during the retroactive and provisional periods was begun on February 26, 1992 and concluded June 4, 1992.

8. When there is a finding of injury, the Department conducts a review to determine normal values and export prices for goods exported to Canada during the provisional period (the period between the preliminary determination and the Tribunal's finding) in order to finalize the

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6. Document No. AP-95-079-17, facsimile dated January 25, 1996, from counsel for the respondent, enclosing an agreed statement of facts executed by both parties.

applicable dumping duty on those shipments. When a case has been suspended because of the acceptance of an undertaking and that undertaking is subsequently violated, [SIMA] provides that importations will be subject to dumping duty commencing on the day the undertaking is violated or the ninetieth day preceding the day of notice of termination of the undertaking is given, whichever is later, and ending on the day a preliminary determination is made.

9. During that review, it was found that three Montreal area importers, including J.B. Multi-National Trade Inc. (hereinafter the "Appellant"), had imported subject goods during the retroactive period. Pursuant to Section 4 of [SIMA], anti-dumping duties were assessed on these importations.

10. In this instance, the retroactive period was determined to be the 90-day period preceding the date of the notification of the termination of the undertaking. As the notification was made at the same time as the preliminary determination of dumping, the retroactive period is thus the 90 days preceding the preliminary determination.

11. The Appellant had imported subject goods on August 22, 1991, which is therefore in the retroactive period.

12. The Appellant had also imported subject goods on October 31, 1991, which is in the provisional period of the investigation.

13. On June 4, 1992, a determination was made by a designated officer pursuant to section 55 of [SIMA].

14. Anti-dumping duties were assessed for the August 22, 1991 importation and for the October 31, 1991 importation.

15. The Appellant subsequently appealed that determination to the Deputy Minister of National Revenue pursuant to section 58 of [SIMA].

16. On March 22, 1993, the Deputy Minister confirmed, under section 59 of [SIMA], the determination made by the designated officer.

17. On May 26, 1993, the Appellant appealed that decision to [the] Tribunal (hereinafter the "previous appeal").

18. In a decision dated April 28, 1994, [the] Tribunal held that the Respondent, in applying paragraph 19(b) of [SIMA] to determine the normal value of the goods in issue, had incorrectly determined the identity of the exporter of the said goods and, on that basis, had incorrectly determined the normal value.

19. As the Tribunal concluded, Fornasa was not the exporter of the pipe as imported on August 22 and October 31, 1991.

20. Indeed, in 1990, due to financial difficulties, Fornasa was unable to secure enough credit to continue purchasing the coil that was required for the manufacture of pipe. In order to continue to manufacture pipe for export, Fornasa entered into an agreement with Fasal.

21. This agreement provided, *inter alia*, that Fornasa would be responsible for negotiating the sales of the pipe to its traditional clients, including transferring letter of credit on Fasal's behalf and attending new clients introduced by Fasal.

22. In carrying out the agreement in respect of sales to the Appellant, which was one of its former customers, Fornasa continued to negotiate the terms and conditions of the sales of pipe, including the price and continued to have regular contact with the Appellant.

23. Therefore, in carrying out the agreement in respect of sales to the Appellant, Fornasa acted as the agent of the supplier/exporter, Fasal.

24. In the said decision, the Tribunal held that the company which supplied the coil, Fasal and not Fornasa (as the Respondent had considered), was the exporter of the goods in issue.

25. The Tribunal accordingly allowed the appeal and remanded the matter to the Respondent to re-determine the normal value of the goods in issue based on the sales and/or costs of Fasal as the exporter.

26. Following a reinvestigation involving Fasal, sufficient information was received from Fasal to establish normal values on the basis of its operation as directed by [the] Tribunal.

27. Consequently, on May 12, 1995, the Respondent, made a re-determination, pursuant to section 59(1)(d) of [SIMA], in respect of two importations of subject goods by the Appellant under transaction number 15009-00169231-5 dated August 22, 1991 and transaction number 15009-0018307-7 dated October 31, 1991.

28. As the normal values were lower than those previously in place, partial refunds of anti-dumping [duties] were made with respect to the two importations as a result of the re-determination.

29. As was the case in the previous appeal, anti-dumping duty has been assessed on both importations mentioned above.

30. By letter dated June 15, 1995, the Appellant filed an appeal to [the] Tribunal.

31. Only the August 22, 1991 importation, entered into Canada during the retroactive period, is the subject of the present appeal.

32. Syntax Comercio, Importacao E Exportacao Ltd., Rua de Passcio no. 70, 8°, andar, Rio de Janeiro - R.J. Brazil was also an exporter of the subject goods to Canada following the acceptance of the undertakings.

33. The Appellant imported a shipment of the subject goods from Syntax by entry released on August 15, 1991 under transaction number 15008001690837.

34. Syntax did not provide an undertaking to officials of the Department of National Revenue nor was it requested to provide such an undertaking as it was not an exporter of the subject goods at the time the undertaking was accepted (January 29, 1988).

35. The importation of the subject goods by the Appellant from Syntax on August 15, 1991 took place within the retroactive period but was not assessed anti-dumping duty by officials of the Department of National Revenue.

At the hearing, counsel for both parties relied entirely on the agreed statement of facts without presenting any evidence and proceeded to make their submissions concerning the appropriate interpretation to be given to the relevant provisions of SIMA.

Counsel for the appellant argued that an undertaking was never given by or on behalf of Fasal S/A-Comércio e Indústria de Produtos Siderúrgicos (Fasal) and that, as a result, subparagraph 4(*b*)(ii) of SIMA is inapplicable to the goods in issue exported by Fasal and released prior to the date of the preliminary determination of dumping. Rather, counsel submitted that subparagraph 4(*b*)(i), which refers to goods released during the period beginning on the day of the preliminary determination of dumping and ending on the day of the Tribunal's order or finding, is applicable to Fasal's exports.

Counsel for the appellant submitted that the language of subparagraph 4(*b*)(ii) of SIMA is clear and referred the Tribunal to the decision of the Supreme Court of Canada in *Jake Friesen* v. *Her Majesty the Queen*[7] for guidance in interpreting such a provision. In particular, he referred to the reference by Major J. to the following excerpt from *Principles of Canadian Income Tax Law* by Professor Hogg:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.... [The *Antosko* case] is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose.[8]

Counsel for the appellant referred to paragraph 4 of Fornasa's undertaking on which counsel for the respondent relied to show that there had been a violation of that undertaking. Paragraph 4 of the undertaking reads as follows:

> Fornasa will not circumvent this undertaking by the shipment or sale of the subject goods to Canada through a subsidiary, branch, agent or other company, or by the direct or indirect shipment of the subject goods to Canada from or through another country.

Counsel for the appellant argued that the use of the word "circumvent" implies that there is a certain amount of planning or deceit on Fornasa's part in order to avoid the application of that undertaking. Counsel submitted that that is not the case in the facts of this appeal. Counsel pointed out that Fornasa and the appellant are two independent companies and that their relationship was not designed to circumvent the undertaking. Moreover, counsel noted that the appellant was not Fornasa's agent. On the contrary, the Tribunal found that Fornasa was the appellant's agent.

Reference was made to the following excerpt concerning sham transactions from *Stubart Investments Limited* v. *Her Majesty the Queen*[9] to which the Tribunal referred in its decision in *Michelin Tires (Canada) Ltd.* v. *The Minister of National Revenue*:[10]

> The courts have thus far not extended the concept of sham to a transaction otherwise valid but entered into between parties not at arm's length. The reversibility of the transaction by reason of common ownership likewise has never been found, in any case drawn to the Court's attention, to be an element qualifying or disqualifying the transaction as a sham.... There is, in short, a total absence of the element of deceit, which is the heart and core of a sham.[11]

Counsel for the appellant recognized that this statement was made in the context of a case involving the *Income Tax Act*,[12] but submitted that the same principle would apply for purposes of interpreting SIMA. Counsel submitted that the relationship between the appellant and Fornasa began as a result of Fornasa's

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7. [1995] 3 S.C.R. 103.
8. *Ibid.* at 114.
9. [1984] 1 S.C.R. 536.
10. Appeal No. AP-93-333, March 22, 1995.
11. *Ibid.* at 10.
12. R.S.C. 1985 (5th Supp.).

financial difficulties and that there was no element whatsoever of a sham or artificiality associated with that relationship.

Finally, counsel for the appellant referred to the Department of National Revenue's treatment of goods imported by another exporter from Brazil, Syntax Comercio, Importacao E Exportacao Ltd. (Syntax) and released in the period prior to the issuance of the preliminary determination of dumping. In particular, counsel referred to the fact that Syntax, like the appellant, had not provided an undertaking to the Department of National Revenue. Therefore, no anti-dumping duties were assessed on goods imported by it on August 15, 1991, and released prior to the issuance of the preliminary determination of dumping.

Counsel for the respondent submitted that subparagraph 4(*b*)(ii) of SIMA requires only that there be a violation of the undertaking and that there is no indication from that provision that it contemplates that a violation must be intentional or that intention is a factor. She submitted that the determination of whether certain circumstances constitute a violation of an undertaking depends upon the wording of the undertaking. She referred specifically to paragraph 4 of Fornasa's undertaking and submitted, based on this provision, that it is not necessary, in order to establish that there has been a violation of the undertaking, that Fornasa be the exporter or vendor. In her view, this provision contemplates that there may be a circumvention where Fornasa is not the exporter or vendor.

Reference was made to the Tribunal's previous decision[13] concerning the same facts, in which the Tribunal found that Fasal, as opposed to Fornasa, was the exporter of the steel pipe in issue. In particular, counsel for the respondent referred to the Tribunal's findings that Fornasa, previously a manufacturer and exporter of steel pipe, encountered financial difficulties and, therefore, entered into an agreement with Fasal to continue to manufacture steel pipe for export. The agreement provided that Fornasa would be responsible for negotiating the sales of the steel pipe to its traditional clients, including transferring letters of credit on Fasal's behalf, and for attending to new clients. Finally, the Tribunal found that, in carrying out the agreement with the appellant, Fornasa continued to negotiate the terms and conditions, including the price, and that Fornasa acted as the appellant's agent, which was the supplier/exporter. Counsel submitted, based on these findings, that Fornasa, with the knowledge of the undertaking prices and terms and conditions, negotiated and accepted selling prices of the goods shipped to Canada below the undertaking prices and, therefore, violated the undertaking.

The Tribunal is not persuaded by counsel for the appellant's argument that the wording of paragraph 4 of Fornasa's undertaking requires that there be a specific or definite intention to circumvent. Moreover, the Tribunal is of the view that the word "by" followed by a list of activities that may be undertaken, qualifies the word "circumvent" by indicating what activities may constitute circumvention. Adopting this interpretation of "circumvent," the Tribunal's determination as to whether there has been a violation of Fornasa's undertaking depends upon whether it finds, based on the facts, that Fornasa sold the goods in issue to Canada through another company, namely, the appellant, in violation of paragraph 4 of the undertaking.

The Tribunal is of the view that paragraph 4 of the undertaking signed by Fornasa and, in particular, the phrase "sale of the subject goods to Canada through a subsidiary, branch, agent or other company" must be interpreted in the context of the intended effect of that undertaking and the relationship between the

13. *Supra* note 5.

appellant and Fornasa. The Tribunal finds that paragraph 4 of the undertaking was intended to prevent the sale of goods produced by Fornasa to Canada through another company at below the agreed undertaking prices.

In its previous decision, the Tribunal acknowledged that Fornasa entered into the agreement with Fasal to allow it to continue to manufacture pipe for export and to stay in business and that this agreement provided that: (1) Fasal would supply coil to Fornasa, and Fornasa would convert the coil into pipe and send the pipe to an agreed port warehouse; (2) Fornasa would be responsible for negotiating the sales of the pipe to its traditional clients, including transferring letters of credit on Fasal's behalf, and attending to new clients introduced by Fasal; and (3) Fasal would receive payment for the pipe by letter of credit from the purchaser and pay to Fornasa the balance remaining after payment of all of its costs, including the cost of stowage, taxes, freight, warehousing, agents' commissions and an amount for the raw material, from the funds received from the purchaser. The Tribunal also acknowledged that the agreement, as amended, established that a minimum price of US$297 per ton would be retained by Fasal from the proceeds remitted by the purchaser of the coil.[14]

While it is acknowledged that the relationship between Fornasa and Fasal arose as a result of Fornasa's financial difficulties, the Tribunal is of the view that the facts indicate that Fornasa's involvement in the sales of the goods in issue to the appellant, at prices below the agreed prices in Fornasa's undertaking, was more than simply as a manufacturer of steel pipe and that, in effect, Fornasa sold the goods to Canada through another company, Fasal, in violation of the undertaking. Although Fornasa may not have owned the goods in issue, it negotiated the sales and was paid from the proceeds of the sales of the goods in issue, as opposed to being paid directly by Fasal for manufacturing the goods in issue without any connection to or knowledge of the sales of the goods in issue to the appellant in Canada.

Accordingly, the appeal is dismissed.

Raynald Guay
Raynald Guay
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Desmond Hallissey
Desmond Hallissey
Member

14. *Supra* note 5 at 1-2.