

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
Hernán Garcia Corral
Arthur Rosett

MEMORANDUM OPINION AND ORDER

December 18, 2003

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. McInerny, 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 (“Panel”) has before it the Second Redetermination on Remand, Circular Welded Non-Alloy Steel Pipe from Mexico: Scope Determination – Galvak (“Second Redetermination”) issued by the U.S. Department of Commerce (“Commerce”) on June 16, 2003. The Second Redetermination was issued pursuant to this Panel’s Memorandum Opinion and Order dated May 12, 2003 (“Second Panel Opinion”).^{1/}

The Panel affirms the Second Redetermination in part and remands with instructions for Commerce to further explain its analysis of the evidence on the administrative record.

In the Second Redetermination, Commerce articulated a definition of mechanical tubing not subject to the Antidumping Duty Order (“Order”)^{2/} as (a) tubing which does not conform to the dimensions or other physical characteristics of ASTM A-53 or fence

^{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/CBD Enforcement Group III) (Nov. 19, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 9 (hereinafter referred to as the “Scope Ruling Memorandum”). The facts of the underlying matter are set forth in the Panel Opinion, familiarity with which is assumed.

^{2/} Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less than Fair Value, Certain Circular Welded Steel Non-Alloy Steel Pipe from Korea, 57 Fed. Reg. 49453 (Nov. 2, 1992).

tubing, or (b) a “specialized, made-to-order product.” The Panel finds that this definition is reasonable and consistent with the language of the Order. The Panel further finds, however, that Commerce did not explain its application of this definition to the record evidence concerning Galvak’s products with sufficient clarity to determine whether the Department’s conclusions are supported by substantial evidence in the administrative record as a whole.

Definition of Mechanical Tubing

The language describing the scope of the Order is 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 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.^{3/}

As this Panel previously found, the language of the Order:

expressly recognizes that mechanical tubing represents an excluded subset of a broader set of pipes and tubes 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. Second Panel Opinion at 5.

The language of the Order does not define the term “mechanical tubing.” Given the absence of an express definition of “mechanical tubing” in the Order, Commerce enjoys

^{3/} Id.

the discretion to apply a reasonable interpretation of the term “mechanical tubing” in order to distinguish out-of-scope merchandise from in-scope standard pipe.

In its original Scope Determination and in its First Redetermination, Commerce focused on the ASTM A-53 standard describing “standard pipe” in order to define “mechanical tubing” in the negative: any product meeting A-53 was perforce standard pipe and hence in-scope. Such use of the A-53 standard was rejected by this Panel, as it did not admit the possibility anticipated by the structure of the Order that some product might meet A-53 (or otherwise have overlapping physical characteristics) yet still reasonably be found to be mechanical tubing. In its Second Redetermination, Commerce has adopted a definition of mechanical tubing that respects the potential overlap of physical characteristics between out-of-scope mechanical tubing and in-scope standard pipe.

The Second Redetermination is clear that where there is **no** overlap of dimensional or other physical characteristics with standard pipe, pipe and tubing “designated as mechanical tubing” is outside the scope of the Order.^{4/} Specifically, Commerce stated that:

Any tubing produced by Galvak to ASTM A-787 which does not conform to the dimensions and characteristics of ASTM A-53 and fence tubing is outside the scope of the Order, as this is mechanical tubing and is thus excluded.

Second Redetermination at 1-2.

^{4/} Commerce states that “tubing designated as mechanical tubing is excluded [from the Order] unless otherwise demonstrated by the physical characteristics.” Second Redetermination at 5.

While it would not be reasonable to use the A-53 standard preclusively to sweep goods into the Order's scope, it is reasonable to use the A-53 standard to identify products that are considered out-of-scope. The Second Redetermination clarifies that all A-787 products of Galvak that do *not* meet A-53 are out-of-scope. The Panel affirms the first element of Commerce's definition.

A simple comparison of product standards does not end Commerce's definitional analysis, however. Because the language of the Order recognizes that standard pipe and mechanical tubing may share the same "physical description," a complete definition of mechanical tubing must also govern cases involving overlapping dimensional characteristics, such as where both A-53 and ASTM A-787 are met. Where Galvak's product meets ASTM A-787 yet conforms to the dimensions and characteristics of ASTM A-53 as well, Commerce still must determine whether that product is (a) mechanical tubing, and therefore excluded, or (b) standard pipe, and therefore in-scope. In distinguishing out-of-scope mechanical tubing from in-scope standard pipe that share physical characteristics, Commerce must respect the presumptive exclusion of mechanical tubing contained in the Order.

The Panel finds that Commerce properly addressed such products in the Second Redetermination when it defined mechanical tubing as a "specialized, made-to-order product." Second Redetermination at 7. This definition is not based solely on physical characteristics (nor is it based on use), and can reasonably function to distinguish in-scope standard pipe from out-of-scope mechanical tubing, even if the compared products share physical characteristics. The Panel reads the Second Redetermination to state that tubing that can be demonstrated to be "specialized, made-to-order product" will be considered

mechanical tubing and excluded from the Order’s scope even if it shares dimensions and characteristics – including those of ASTM A-53 – with standard pipe.

Based on the “specialized, made-to-order product” definition articulated by Commerce in the Second Redetermination, Galvak’s products are beyond the scope of the Order if they (1) have different physical dimensions than ASTM A-53 pipe or fence tubing, (2) have identical dimensions as ASTM A-53 or fence tubing, but can be shown to have other differing physical characteristics which demonstrate that the product is specialized or made-to-order, or (3) can be otherwise shown to be specialized or made-to-order.

One possible example of an out-of-scope mechanical tubing product would be a product with the same length and diameter as standard pipe, but which has different metallurgical properties. Such a product may be shown to have “differing physical characteristics” or to be “specialized or made-to-order.” Other possible distinguishing physical characteristics suggestive of a “specialized or made-to-order product” would include, in particular, non-standard diameters, wall thicknesses, lengths, yield or tensile strengths, or bendability characteristics.

The Panel notes that had Commerce focused solely on dimensional differences as the sole basis for determining a tubing product to be out-of-scope, the Panel would not affirm this element of Commerce’s Second Redetermination. However, Commerce’s definition of mechanical pipe as “specialized, made-to-order” respects the language of the Order. Therefore, the Panel finds that Commerce’s definition of out-of-scope mechanical tubing is reasonable and affirms the Second Redetermination in this respect.

Application of the Definition

Having affirmed the Department's definition of mechanical tubing as articulated in the Second Redetermination, the Panel does not affirm the Department's application of that definition to facts on the administrative record and remands for the Department to further consider the evidence or better explain its analysis.

Commerce's factual analysis was explained in the Second Redetermination as follows:

To illustrate one of Galvak's products which is within the scope of the order, the Department analyzed Galvak's August 11, 1998 submission. Attachment 1 of that submission contains products which Galvak can produce and compares the outside diameter and wall thicknesses of these products to ASTM A-53 products. Attachment 2 provides Galvak's product brochure. According to Attachment 1, Galvak produces tubing with an outside diameter of 48.26 mm, equivalent to 1.9000 (1½) inches. This diameter of pipe is also produced to an ASTM A-53 specification. Similarly, Galvak produces pipe with an outside diameter of 33.4 mm, or 1.315 (1) inch. Both fence tubing and pipe produced to ASTM A-53 exist with this same diameter. . . . While Galvak failed to provide more explicit information on the characteristics of specific wall thickness and diameter sizes, and did not provide any length information, for all of the products that Galvak intends to export, the Department concludes, based on the ASTM A-53 standard and the information submitted by petitioners and Galvak, that Galvak's products produced with the ASTM A-53 or fence tubing specifications are not mechanical tubing. Should Galvak produce and export either of these diameter sizes of pipe with wall thicknesses which conform to the ASTM A-53 specification or the fence tubing specifications as presented by the petitioner . . . in wall thicknesses of, for example, 1.83, 2.29, 3.05, 3.68, 5.08, 7.17, or 10.16 mm for 1½ diameter pipe, in lengths of between 18' and 24', then the Department would consider these not to be mechanical tubing, but standard pipe or fence tubing, and thus included in the scope of the Order.

Second Redetermination at 6-7.

The Panel concludes that this analysis is flawed in a number of respects. Fundamentally, Commerce does not explain the extent to which the information contained in Attachment 2 to Galvak's August 11, 1998 was considered in its analysis. Such an explanation is warranted because Attachment 2 appears to include a matrix showing the variety of outside diameter sizes in which Galvak makes mechanical tubing and each of the wall thicknesses in which each diameter of tubing may be manufactured. This appears to be exactly the "explicit information on the characteristics of specific wall thickness and diameter size" that Commerce concluded was lacking in the record. Commerce may have considered this information and in its expertise found it in some manner to be unpersuasive, but, if so, this is impossible for the Panel to discern.

Commerce's analysis also fails to explain why a diameter of 1.900 inches is equivalent to 1½ inches for purposes of its analysis, a material point of uncertainty because Attachment 2 indicates that Galvak produces tubing in both 1½ inch and 1.900 inch diameters. Attachment 2 also appears to indicate that Galvak produces these two diameters in a total of 9 different wall thicknesses, only one of which is among the list of examples given on page seven of the Second Redetermination and therefore potentially "in-scope" under Commerce's mechanical tubing definition.

In addition, the Second Redetermination does not explain why the following assertion, also contained in Galvak's August 11, 1998 submission, is not evidence that Galvak's mechanical tubing is a "specialized made to order" product:

Finally, it should be noted that mechanical tubing that will be used in greenhouse kits will differ from pipe that is subject to the antidumping order in more than one way. The

tubing used in greenhouse kits requires an organic coating to protect the tubing from conditions in the greenhouse. Such coatings are not normally used for standard pipe.

The Panel's role in this proceeding is to review Commerce's analysis of the record evidence, not to re-weigh the evidence, and in doing so we defer to the Department's expertise. The Second Redetermination, however, does not sufficiently describe Commerce's analysis of Galvak's evidence taken as a whole in the context of the mechanical pipe definition articulated in the Second Redetermination to enable us to perform our review.

We therefore remand the Scope Determination to the Commerce Department with instructions to apply its definition of mechanical tubing to the record evidence, including Attachment 2 and other information in Galvak's August 11, 1998 submission, and to fully explain its reasoning in support of its conclusions. The results of this remand shall be filed with the NAFTA Secretariat within 30 calendar days.

So Ordered.

Signed in the Original By:

December 18, 2003

Lawrence J. Bogard, Panel Chair
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Jeffery Atik
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