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 Cyril Atik
Lucia Ojeda Cardenas
Hernan Garcia Corral
Arthur Rosett

MEMORANDUM OPINION AND ORDER

November 19, 2002

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OPINION AND ORDER OF THE PANEL

This Binational Panel has been asked to review a Final Scope Ruling [1] ("Scope Ruling") issued by the U.S. Department of Commerce ("Commerce") concerning the Antidumping Duty Order on Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela[2] ("Order"). In the Scope Ruling Commerce declined the request of Galvak S.A. de C.V. ("Galvak") to determine that the tubular products that Galvak intended to export to the United States were not within the scope of the Order.

This Panel was convened pursuant to Article 1904 of the North American Free Trade Agreement ("NAFTA") in response to a Request for Panel Review filed on behalf of Allied Tube and Conduit Company, the Sawhill Tubular Division of Armco, Inc., and Wheatland Tube Company (the "Domestic Producers"), pursuant to Rule 34 of the NAFTA Article 1904 Panel Rules.[3]

In conformity with Article 1904.8 of the NAFTA, and Part VII of the NAFTA Article 1904 Panel Rules, this Panel hereby renders its written decision. We find that in its analysis supporting the Scope Ruling, Commerce failed to take into account the exclusionary nature of the pertinent language in the Order. This exclusionary language

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[1] 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 Memorandum").

[2] *See* 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 Non-Alloy Steel Pipe from Korea, 57 Fed. Reg. 49453 (Nov. 2, 1992). *See also infra* note 6.

[3] *See* First Request for Panel Review on behalf of Allied Tube and Conduit Company, the Sawhill Tubular Division of Armco, Inc. and Wheatland Tube Company (Dec. 23, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 1.

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. Commerce adopted the opposite approach, presuming that all mechanical tubing is covered by the Order unless it is demonstrated otherwise. This approach, however, expanded the Order beyond its original scope and is therefore unlawful. In addition, Commerce did not adequately explain why the analysis that it employed in a previous scope ruling interpreting the same exclusionary language of the same Order was not applied in this case. For these reasons, the Panel remands the Scope Ruling for action not inconsistent with this decision.

BACKGROUND

Previous Proceedings

On September 24, 1991, members of the pertinent U.S. industry[4] filed a Petition for the imposition of Antidumping Duties on circular welded non-alloy steel pipe from Brazil, the Republic of Korea, Mexico, Romania, Taiwan and Venezuela. Thereafter, Commerce published an affirmative final determination of sales at less than fair value with respect to circular welded non-alloy steel pipe from Mexico and other countries.[5]

In October 1992, the International Trade Commission ("ITC") issued a final determination with respect to Circular Welded Non-Alloy Steel Pipe and Tubes, in the context of which it determined that mechanical tubing is a different like product from

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[4] The Petitioners comprised the following companies: Allied Tube and Conduit Corporation, American Tube Company, Bull Moose Tube Company, Century Tube Corporation, Laclede Steel Company, the Sawhill Tubular Division (Cyclops Corporation), Sharon Tube Company, Western Tube and Conduit Corporation and Wheatland Tube Company.

[5] *See* Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from Mexico, 57 Fed. Reg. 42953 (Sept. 17, 1992).

standard and structural pipes and tubes. Further, due to the insignificant volume of imports of these products, the ITC found that subject imports were not a cause of material injury to domestic producers of mechanical tubing. Notably, Petitioners supported both the separate like product and "no injury" conclusions concerning mechanical tubing.[6]

On November 2, 1992, after a number of modifications to the scope of the investigation, Commerce published the Order. The language describing the scope of the Order is as follows:

> The products covered by these orders 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). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquid and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses, and generally meet ASTM A-53 specifications. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for farming and support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in these orders.
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> 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. Standard pipe that is dual or triple certified/stenciled that enters the United States as line pipe of a kind used for oil or gas pipelines is also not included in this order.
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> Imports of the products covered by this order are currently classifiable under the following Harmonized Tariff Schedule (HTS)

[6] *See* Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela, Inv. Nos. 731-TA-532 through 537 (Final), USITC Pub. 2564 (Oct. 1992).

> subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90.[7]

On June 7, 1993, Commerce initiated a scope inquiry regarding API 5L line pipe and pipe dual-certified for use as standard pipe or API 5L line pipe. The procedure was aimed at determining whether API 5L line pipe, when used in standard pipe applications, was included within the scope of the Order. On March 21, 1996, Commerce issued a final scope determination ("Line Pipe Determination"), stating that the exclusionary language in the Order was "based upon industry classifications, without discussion of actual end uses,"[8] and concluding that all pipes and tubes entering the United States under the Harmonized Tariff Schedule Subheading for line pipe were outside the scope of the Order.

The Current Proceeding

On June 16, 1998, Galvak applied to Commerce for a ruling that mechanical tubing manufactured to meet the ASTM A-787 industry standard was outside the scope of the Order. In its request, Galvak suggested that Commerce could issue a ruling without resorting to a full scope inquiry.[9]

On July 8, 1998, the Domestic Producers filed comments responding to Galvak's request. In their comments, the Domestic Producers argued that the products which Galvak intended to export, i.e., mechanical tubing certified to ASTM A-787, are within the scope of

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[7] *See* Circular Welded Non-Alloy Steel Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 33041 (June 17, 1998); *see also* Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, the Republic of Korea, Mexico, and Venezuela, 61 Fed. Reg. 11608 (Mar. 21, 1996).

[8] *See* 61 Fed. Reg. at 11610. *See also* Wheatland Tube Co. v. United States, 973 F. Supp. 149 (Ct. Int'l Trade 1997), *aff'd*, 161 F.3d 1365 (Fed. Cir. 1998).

[9] *See* Galvak's Scope Ruling Request (June 16, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 1128.

the Order to the extent that they would be used in standard pipe applications.[10] On July 14, 1998, Galvak responded to the Domestic Producer's comments.[11]

Based on the submissions described above and having examined the petition, the initial investigation, Commerce's determinations and the previous scope determination, Commerce initiated the challenged scope inquiry on July 22, 1998. On August 11, 1998, the Complainant and the domestic producers filed their comments and arguments supporting their positions. On August 28, 1998 the parties presented their responses to the comments included in the August 11 submissions.[12]

On November 19, 1998, Commerce issued the challenged Scope Ruling, concluding that Galvak's tubing manufactured to meet the ASTM A-787 standard is not excluded from the scope of the Order. In reaching this conclusion, Commerce first determined that the language of the Order is not dispositive of the issue whether mechanical tubing manufactured to the ASTM A-787 standard is outside the scope of the Order. Commerce, therefore, decided that it was necessary to conduct its analysis on the basis of the so-called Diversified Products[13] criteria in accordance with 19 C.F.R. § 351.225(k)(2). This analysis was conducted with reference only to the specific mechanical tubing that Galvak intended to import.[14]

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[10] *See* Domestic Producers' Comments on Galvak's Scope Ruling Request (July 8, 1998). NAFTA Secretariat, Adm. Record, Joint App., Part 2, Sec. E, 3.

[11] *See* Galvak's Response to Domestic Producers' Letter Opposing Galvak's Scope Ruling Request (July 14, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 1134.

[12] *See* Galvak's Letter to Investigating Authority (Aug. 11, 1998), and Domestic Producers' Letter to Investigating Authority (Aug. 11, 1998), NAFTA Secretariat, Adm. Record Pub. Doc. 1155 and 1157. *See also* Galvak's Letter to Investigating Authority (Aug. 18, 1998), and Domestic Producers' Letter to Investigating Authority (Aug. 11, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 1169 and 1171.

[13] Diversified Products Corp. v. United States, 572 F. Supp. 883 (Ct. Int'l Trade 1983).

[14] Scope Ruling Memorandum, *supra* note 1.

In making its determination, Commerce stated, in pertinent part, as follows:

> Based on a thorough review of the record, and after careful consideration of the general comments addressing the *Diversified Products* factors by interested parties, we conclude that all tubing certified to meet the ASTM A-787 standards specification for "electric-resistance-welded metallic-coated carbon steel mechanical tubing," is not excluded from the scope of the order on circular welded non-alloy steel pipe from Mexico. . . .
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> First, we continue to find that the written descriptions and prior scope rulings are not dispositive. The sole description of excluded mechanical tubing is contained in the ITC report and is based exclusively on use. The uses of the A-787 pipe described by Galvak are not dedicated only to the uses discussed by the ITC; therefore, the descriptions of mechanical tubing are not dispositive in this case. The mere presence of the word "mechanical" in the ASTM definition does not necessarily mean that the product falls within the exclusion.
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> From the information on the record, we cannot be assured that "mechanical tubing," specified to A-787 standards, will fall within the exclusion because the physical characteristics of mechanical tubing and subject merchandise can overlap. The only description of excluded mechanical tubing used by the ITC is based exclusively on use. . . .
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> Galvak's contention that the ITC based its definition of mechanical tubing completely on normal industry classifications and not on end use is incorrect. The Commission defined excluded mechanical tubing solely in accordance with their end uses. In addition, Galvak's comparison of the Department's negative scope determination with respect to line pipe to this scope inquiry on mechanical tubing is misplaced. In that case, the Department made no analysis as to mechanical tubing, and held that the inclusion or exclusion of line pipe was tied to its HTS category, based on the petitioners' acknowledgement that any pipe entered under the item heading for line pipe would be outside the scope of the petition . . . . By contrast in this case the only description of the excluded products is the ITC's discussion of the uses of mechanical tubing. Therefore, the analysis in this case is very different from that used in the line pipe decision.

Scope Ruling Memorandum at 9-11.

Procedural History of This Review

On December 23, 1998, the Domestic Producers filed a Request for Panel Review under Rules 33 and 34 of the NAFTA Article 1904 Panel Rules.

In accordance with the provisions of Rule 39 of the NAFTA Article 1904 Panel Rules, on January 21, 1999, Galvak filed a Complaint alleging the following errors of fact or law:

a. Commerce ignored the explicit language of the Order, which unambiguously excludes "mechanical tubing" from the scope of the Order;

b. Commerce, contrary to previous scope determinations, concluded that the scope of the Order is defined by the actual end use of the product and not by "industry classifications;"

c. Commerce's argument that the ITC defined mechanical tubing solely based on end use was contrary to the underlying record of the ITC proceedings;

d. Commerce's analysis of the Diversified Products criteria was biased and inherently circular.[15]

Under Rule 57 of the NAFTA Article 1904 Panel Rules, (i) Galvak filed its brief on April 26, 1999;[16] (ii) briefs of Commerce and the Domestic Producers were filed in July 26;[17] and (iii) Galvak filed a reply brief in August 10.[18]

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[15] *See* Galvak's Complaint (Jan. 21, 1999). NAFTA Secretariat, Adm. Record Pub. Doc. 5.

[16] *See* Galvak's Brief (Apr. 26, 1999). NAFTA Secretariat, Adm. Record Pub. Doc. 11.

[17] *See* Domestic Producers' Brief in opposition to Complainant's Brief (July 26, 1999). NAFTA Secretariat, Adm. Record Pub. Doc. 19. *See also* Brief of Investigating Authority and Notice of Motion to Strike Portions of Complainant's Rule 57.1 Brief (July 26, 1999). NAFTA Secretariat, Adm. Record Pub. Doc. 20. On June 15, 2001, this Panel denied the motion in part. In view of the basis for the Panel's decision, it is not necessary for the Panel to rule on the remaining portions of the Investigating Authority's Motion to Strike and the Panel does not do so.

A public hearing was held on June 7, 2002, in Washington, D.C., at which oral arguments were presented by the parties.

UNITED STATES STANDARD OF REVIEW

In reviewing Commerce's Final Scope Ruling, this Panel is obligated to follow the appropriate standard of review. This is not an international standard, but the standard of the importing Party. As such, a different standard is utilized in this case, dealing with the United States as the importing Party, than is used if the importing Party is Mexico. Each country has its own standard of review and the proper functioning of Chapter 19 requires that one country's standard of review not be used in the review of determinations made by another country's agency.[19]

The starting point in the analysis of the standard of review that this Panel shall apply to Commerce's administrative determination is NAFTA Article 1904. Article 1904 directs each Party to replace judicial review of final antidumping determinations with binational panel review.[20] An involved Party may request that a Panel review a final antidumping determination of a competent investigating authority based on the administrative record to determine whether such determination was in accordance with the antidumping law of the importing Party. The "antidumping law" for this purpose consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such sources. [21]

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[18] *See* Galvak's Reply Brief (Aug. 10, 1999). NAFTA Secretariat, Adm. Record Pub. Doc. 23.

[19] A Panel's use of the incorrect standard of review is grounds to launch an Extraordinary Challenge review. *See* NAFTA, Article 1904.13(a)(ii).

[20] NAFTA, Article 1904.1.

[21] NAFTA, Article 1904.2

The Panel is to apply the standard of review set out in Annex 1911 to NAFTA and the general legal principles that a court of the importing Party otherwise would apply. [22] Annex 1911 states, in pertinent part, that the standard of review for the United States is the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1516(b)(1)(B).[23]

Section 516A(b)(1)(B) of the Act thus requires this Panel to "hold unlawful any determination, finding, or conclusion found…to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." If the determination under review fails either of these tests, the Panel must remand the determination to Commerce.

Review by this Panel has replaced review by the Court of International Trade ("CIT"). This Panel conducts its review as prescribed by NAFTA and must therefore either affirm the determination or remand it to Commerce for action not inconsistent with the Panel's decision.[24] In so doing, this Panel is bound by the decisions of the United States Supreme Court and by the decisions of the Court of Appeals for the Federal Circuit ("CAFC").[25] While not strictly bound by decisions of the CIT, this Panel will view those decisions as those of a brother court and afford them great deference.[26] In addition, this Panel is not bound by the decisions of prior Panels, but may seek guidance from the reasoning of other Panels when persuasive.[27]

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22 NAFTA, Article 1904.3.

23 *See* "standard of review," as defined in NAFTA, Annex 1911.

24 NAFTA, Article 1904.8.

25 Grey Portland Cement and Clinker from Mexico, USA-Mex-97-1904-01, June 18, 1999.

26 Id.; *see also* Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984).

27 Corrosion–Resistant Carbon Steel Flat Products from Canada, USA-CDA-98-1904-01, March 20, 2001.

Substantial Evidence

This Panel applies the substantial evidence standard to determinations of fact made by Commerce. The Supreme Court has defined substantial evidence "as more than a mere scintilla,"[28] but "something less than the weight of the evidence."[29] Substantial evidence comprises such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[30]

This Panel must ensure that Commerce has based its decision on the evidence before it. This Panel must look at the evidence which was before Commerce, and we cannot look at evidence outside the administrative record. When performing our review function, the Panel cannot reweigh the evidence before the Department, nor can it substitute its own judgment for that of Commerce. This Panel must uphold Commerce's determination if, looking at the record as a whole – both the evidence that supports Commerce's determination and the evidence that detracts from it – there is reasonable factual support for Commerce's determination.

However, such deference does not mean that this Panel is powerless. Our deference is conditioned on the existence of a reasoned basis for Commerce's determination and the agency's explanation must be sufficiently cogent to appeal to a reasonable mind. This reasoned basis must link the facts found to the choice made by Commerce in a manner discernable to this Panel. Courts and prior Panels have determined that the degree of deference paid to Commerce will depend on the thoroughness evident in its consideration of

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[28] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[29] *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

[30] *See* Universal Camera at 477.

the facts, the validity of its reasoning and the consistency of the determination with earlier and later pronouncements.

As there are no issues of fact before this Panel in the instant review, the focus of this decision will be on the issues of law that have been raised by the parties.

In Accordance with Law

In assessing whether Commerce's determination is in accordance with law, the Panel must consider the agency's interpretation of the relevant statutes, regulations, and judicial precedents. In matters of statutory interpretation, this panel will engage in a two-step process. If the statute is clear and unambiguous on its face and Commerce interprets it accordingly, this Panel must defer to Commerce's interpretation.[31] However, where the statute is silent or ambiguous, then this Panel must determine whether Commerce's interpretation is based on a permissible or reasonable interpretation of the statute.[32] The degree to which a Panel must defer to Commerce's interpretation in these circumstances depends on the expertise that Commerce has in dealing with the particular statute.[33] The more expertise Commerce has in the area, the greater the deference that must be paid to its interpretation. This Panel must uphold Commerce's reasonable interpretation of the statute even if it is not the interpretation that the Panel itself would have made.[34]

Again, deferring to Commerce does not mean simply accepting the Department's interpretation. This Panel must carefully look at the interpretation and decide whether it is a

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[31] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[32] Chevron at 843. *See also*, National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992).

[33] Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996).

[34] Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).

reasonable construction of the statute. Torrington Co. v. United States, 82 F.3d 1039, 1044 (Fed. Cir. 1996). In assessing whether the agency's interpretation is reasonable, this Panel may look at the relevant statutes, Commerce's past practice,[35] the United State's international obligations, legislative history, judicial precedent, and prior Panel reasoning.

As noted by prior Panels and the Courts, even though there may be a presumption of good faith by Commerce, Commerce must observe the basic principles of due process and fundamental procedural fairness and justify any departures it might make from established practices with reasoned explanations. The fact that prior reviews are based on factually different production and import data is not of itself sufficient to explain the adoption of a changed legal interpretation by Commerce.[36] That is, the agency may not change its analysis arbitrarily or without explanation for the change. *See* Torrington Co. v. United States, 745 F. Supp. 718, 727 (Ct. Int'l Trade 1990).

ANALYSIS AND DECISION

Unquestionably, the Commerce Department "enjoys substantial freedom to interpret and clarify" the scope of its antidumping duty orders.[37] Such freedom is not unfettered, however. While the reviewing courts – and this Panel – must grant "significant deference" to Commerce's interpretation of those orders, Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002); Ericsson GE Mobile, *supra*, Commerce "cannot 'interpret' an

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[35] *See* Grey Portland Cement and Clinker From Mexico, *supra*. *See also* Ceramica Regiomontana S.A v. United States, 636 F. Supp. 961 at 965 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), *aff'd*, 810 F.2d 1137 (Fed. Cir.1987).

[36] *See* Western Conference of Teamsters v. Brock, 709 F. Supp. 1159 at 1169-1170 (Ct. Int'l Trade 1989).

[37] Ericsson GE Mobile Communications, Inc. v. United States, 60 F.3d 778, 781 (Fed. Cir. 1995), citing Smith Corona Corp. v. United States, 915 F.2d 683, 686 (Fed. Cir. 1990).

antidumping order so as to change the scope of that order, nor can Commerce interpret the order in a manner contrary to its terms."[38]

Commerce has promulgated regulations governing the procedure by which the Department determines whether a specific product falls within the scope of an antidumping order, 19 C.F.R. § 351.225. The regulation states, concerning scope determinations in circumstances relevant to this matter:

> In considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:
>
> (1) the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
>
> (2) When the above criteria are not dispositive, the Secretary will further consider:
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> (i) The physical characteristics of the product;
> (ii) The expectations of the ultimate purchasers;
> (iii) The ultimate use of the product;
> (iv) The channels of trade in which the product is sold; and
> (v) The manner in which the product is advertised and displayed

19 C.F.R. § 351.225(k).

Paragraph (1) of this regulation manifests the observation of the Court of Appeals for the Federal Circuit that antidumping duty orders are "interpreted with the aid of the antidumping petition, the factual findings and the legal conclusions adduced from the administrative investigation and the preliminary order." Smith Corona, *supra* at 685.

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[38] *See also* Eckstrom Industries, Inc. v. United States, 254 F.3d 1068, 1072 (Fed. Cir. 2001); Wheatland Tube Co. v. United States, 161 F.3d 1365, 1370 (Fed. Cir. 1998).

Paragraph (2) employs the analytic criteria first articulated by the Court of International Trade in Diversified Products, *supra* note 13.

Key to this scheme is that the starting point of Commerce's scope analysis is the language of the Order itself. "Thus, review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order." Duferco at 1097. Accordingly, "Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." Id. at 1089.

The pertinent language of the Certain Circular Welded Non-Alloy Steel Pipe from Mexico Antidumping 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.* Standard pipe that is dual or triple certified/stenciled and enters the United States as line pipe of a kind used for oil or gas pipelines is also not indeed in [this order].

57 Fed. Reg. 49453 (emphasis added).

Notably, the highlighted language – which governs whether mechanical tubing is covered by the Order – is exclusionary. That is, by the plain terms of the Order, mechanical tubing is excepted from the Order's scope absent some reasonable basis for Commerce to conclude otherwise. As with all other products covered by this exclusionary clause,

"mechanical tubing," is not defined by the Order, leaving to Commerce the task of determining what specific products comprising mechanical tubing, if any, might reasonably be embraced within the Order's scope.

Galvak requested Commerce to determine that all mechanical tubing produced to meet ASTM A-787 specifications is outside the scope of the Order because the A-787 standard covers "electrical-resistance–welded metallic-coated carbon steel mechanical tubing." In response, Commerce employed the two-stage approach mandated by section 351.225(k) of it regulations. With respect to the first stage, the Department concluded that product descriptions in prior stages of the proceeding as well as prior scope rulings were "not dispositive" as to whether all mechanical tubing is excluded from the Order.

Initially, the Department determined that "[t]he sole description of excluded mechanical tubing is contained in the [International Trade Commission's] final determination of material injury report and is based exclusively on use. The uses of A-787 pipe described by Galvak are **not dedicated only** to the uses described by the ITC. Therefore the descriptions of mechanical tubing are not dispositive in this case." Scope Ruling Memorandum at 9 (emphasis added). In this context, Commerce found that "Galvak's argument" that products produced to meet the ASTM A-787 standard are outside the Order was also not dispositive because:

> The mere presence of the word "mechanical" in the ASTM definition does **not necessarily** mean that the product falls within the exclusion.
>
> From the information on the record, **we cannot be assured** that "mechanical tubing" specified to A-787 standards, will fall within the exclusion because the physical characteristics of mechanical tubing and subject merchandise can over lap.

Id. at 9-10 (emphasis added).

Commerce did acknowledge a prior scope determination in which it interpreted the same exclusionary clause of the same antidumping duty order, Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, the Republic of Korea, Mexico and Venezuela, *supra* note 7 ("line pipe"). In line pipe, Commerce concluded that all "line pipe" was excluded from the order. Commerce did not, however, "take into account" the line pipe determination, as its regulation directs. Rather, the Department merely described why a "comparison" of the line pipe determination to the mechanical tubing scope inquiry was "misplaced." In this context, Commerce observed that the line pipe determination made no analysis as to mechanical tubing, and was tied to the Harmonized Tariff System subheading under which products are imported as "line pipe," rather than product uses. Thus, Commerce concluded, "the analysis in this case is very different from that used in the line pipe decision." Id. at 11.

Commerce then concluded that it could not make its scope determination based only on the first stage of analysis mandated by section 351.225(k), but would need to consider the Diversified Products factors set forth in the regulation:

> Given that the only description of mechanical tubing is the ITC's discussion of the uses of that product, and the fact that it is unclear whether the products Galvak intends to import are dedicated to or even intended for such uses, we must turn our analysis to the *Diversified Products* criteria.

Id.

The Department then summarized its findings with respect to each of the Diversified Products criteria, and concluded that

> Mechanical pipe is not excluded from the scope of the antidumping duty order on circular welded non-alloy steel pipe from Mexico based solely on the fact it is produced to ASTM A-787 standards. To determine whether a product falls within the scope of the order or is excluded mechanical tubing, the

> Department would require more detailed information on the characteristics and uses of the products at issue.

Id. at 12.

This Panel concludes that the Scope Ruling cannot be sustained and must be remanded to the Department. While Commerce is free to interpret and clarify antidumping Orders, in this instance the Department's analysis served to expand the Order beyond its original scope.

Fundamentally, the approach adopted by Commerce in the first stage of its analysis fails to take into account the Order's express exclusion of mechanical tubing from its scope: the Order includes "all carbon steel pipe and tubes with the physical description outlined above . . . except . . . mechanical tubing . . . ." As a consequence of the Order's language, the Department may interpret the term "mechanical tubing" – which is not expressly defined in the Order – but it must do so starting from the proposition that "mechanical tubing" is generally excluded from the Order. In effect, a determination that finds a mechanical tubing product to be subject merchandise would be finding an exception to the Order's exclusionary language. The context within which Commerce must interpret the Order, therefore, is that all the products listed in the Order's exclusionary clause[39] are outside the scope of the Order unless it is demonstrated otherwise.

Commerce took the opposite approach in the mechanical tubing scope determination, and started from the presumption that mechanical tubing was in-scope merchandise. Thus, Commerce rejected Galvak's proposed use of ASTM A-787 as an identifier of mechanical tubing because the uses for A-787 pipe are "not dedicated only" to the uses identified in the ITC's report. Similarly, the Department's statement that it "cannot be assured that

[39] " . . . except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit."

'mechanical tubing' specified to A-787 standards will fall within the exception because the physical characteristics of mechanical tubing and subject merchandise can overlap" portrays a failure to correctly view mechanical tubing as a broad exception to the Order's scope.

Commerce impermissibly broadened the scope of the Order when it required "assurances" that products meeting independent standards defining merchandise facially beyond the Order's scope could never be used in standard pipe applications. Nor can this narrowing of the exception be justified, as Commerce has attempted, on the grounds that subject merchandise and excepted merchandise have overlapping physical characteristics. The Order explicitly recognizes that the excepted products – including mechanical tubing – have the same physical characteristics as subject merchandise. Common physical characteristics merely describe the circumstances giving rise to the exception, they do not justify narrowing the exception.

The Department's statement that it "cannot be assured" that ASTM A-787 mechanical tubing will fall within the Order's exclusionary language implies that the Department's goal in the scope determination was to preclude circumvention of the Order. But precluding circumvention, however worthy a goal, does not justify expanding the Order beyond its original scope. The statute contains a provision, 19 U.S.C. § 1677j, expressly directed to preventing circumvention of antidumping and countervailing duty order. This provision, rather than expansion of the Order beyond its original scope, is the mechanism through which any circumvention should be remedied.

The Scope Ruling's statement that "the Commission defined excluded mechanical tubing solely in accordance with … end uses" similarly fails to justify Commerce's limitation of the mechanical tubing exception. Initially, we note that while the

Commission did look principally to end use to define mechanical tubing, end use was not its "sole" consideration. The Commission did consider that subject merchandise is generally produced to industry standards while mechanical tubing is produced to Customer specifications, that the products "generally are not interchangeable," that they are sold in different channels of distribution, that mechanical tubing is generally more costly, and that the majority of mechanical tubing producers in the United States did not produce subject merchandise. USITC Pub. 2564 (Oct. 1992) at 16. In short, the Commission's like product description was not based "solely" on end use, as the final Scope Ruling states.

Moreover, the end uses for mechanical tubing identified in the Commission's report appear merely to be examples of such end uses rather than an exhaustive and exclusive list. Id. at I-7. Consequently, it is not reasonable for Commerce to have made an affirmative scope determination grounded on the observation that "the uses of the A-787 pipe described by Galvak are not dedicated only to the uses discussed by the ITC." Scope Ruling Memorandum at 9 (emphasis added). There is no reasoned basis to conclude that the only uses for mechanical tubing are those listed by the Commission or that the Commission intended to define mechanical tubing solely in terms of the listed uses.

The Panel also concludes that Commerce failed to give due consideration to the Line Pipe Determination. In that Determination, the Department quoted the same exclusionary clause of the same antidumping duty Order at issue here and stated,

> [T]he scope language excludes these separate categories of pipe, based upon industry classifications, without discussions of actual end uses. It follows that line pipe is not covered by the order regardless of how it is actually used.

61 Fed. Reg. at 11610.

Thus, in the Line Pipe Determination the Department found the language of the Order to be dispositive and resort to the Diversified Products criteria to be unnecessary. Moreover, the Department in the Line Pipe Determination described the entire exclusionary clause as being based on industry classifications, not actual end use – without reference or limitation to specific products within the clause. This analysis stands in contrast to the Department's approach in the scope determination before us.

Certainly, the fact that Commerce found line pipe to be excluded from the Order does not require the Department to find mechanical tubing also to be excluded. The products are undeniably different, and therefore on the basis of its facts the Line Pipe Determination is not controlling precedent for mechanical tubing. However, while Commerce is not bound in the mechanical tubing determination to use the same analysis employed in Line Pipe, i.e., that the products identified in the exclusionary clause are based on industry classification rather than end use, the Department may not change its analysis arbitrarily or without explanation for doing so. It is a basic "principle of administrative law that an 'agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.' " Torrington Co. v. United States, 745 F. Supp. 718, 727 (Ct. Int'l Trade 1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991) quoting Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n, 659 F.2d 488, 506 (5th Cir. 1981).

In the Line Pipe Determination, the Department declared that products fell within the exclusionary clause "based on industry classifications without discussion of actual end use," yet based its mechanical tubing determination expressly on end use. The Panel finds the Department's explanation for this deviation from the Line Pipe Determination's fundamental analysis – i.e., that the exclusionary clause is not based on end use – to be insufficient.

Merely dismissing, as Commerce does, any "comparison of the . . . determination with respect to line pipe to this scope inquiry" as "misplaced" does not explain why the line pipe analysis was not employed here. Merely to state, as Commerce also does, that the Line Pipe Determination did not analyze mechanical tubing, fails to explain why the **analysis** employed in the Line Pipe Determination should not be applied in mechanical tubing when the latter is included in the same exclusionary clause as the former. Further, the relevant language in the Line Pipe Determination focuses on the industry classification as the basis for the exclusionary clause, not Harmonized Tariff Schedule subheadings, and it is this analytic conclusion that Commerce failed to distinguish in the mechanical tubing determination. The mechanical tubing determination concludes that "the analysis in this case is very different from that used in the line pipe decision." This may be true, even obvious, but it does not answer the necessary question: **Why** is the analysis in this case very different from that used in the line pipe decision?

In light of the Panel's conclusions that the first stage of Commerce's scope analysis cannot be sustained, the Panel does not reach the question of the second stage of Commerce's analysis, review of the Diversified Products criteria.

The Panel hereby remands the scope determination to Commerce with instructions to (1) re-evaluate whether the Order applies to Galvak's mechanical tubing, giving appropriate weight to the fact that the language of the Order on its face excludes all mechanical tubing, (2) if necessary, explain adequately why the line pipe determination's conclusion that the exclusionary clause is based on industry classification and not actual end use should not be employed in the instant scope determination, and (3) take such other action as may be appropriate, not inconsistent with this decision. The results of this remand shall be filed with the NAFTA Secretariat within 60 calendar days.

So Ordered.

Signed in the Original By:

November 19, 2002	Lawrence J. Bogard_________ Lawrence J. Bogard, Panel Chair
November 19, 2002	Jeffery Cyril Atik_________ Jeffery Cyril Atik
November 19, 2002	Hernan Garcia Corral________ Hernan Garcia Corral
November 19, 2002	Lucia Ojeda Cardenas_______ Lucia Ojeda Cardenas
November 19, 2002	Arthur Rosett______________ Arthur Rosett