



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. AP-2012-047 and
AP-2012-048

Salzgitter Mannesmann
International (Canada) Inc. and
Varsteel Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Wednesday, September 25, 2013*

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DECISION 8

IN THE MATTER OF an appeal heard on May 28, 2013, pursuant to subsection 61(1) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF two decisions of the President of the Canada Border Services Agency dated September 19, 2012, with respect to requests for re-determination pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

**SALZGITTER MANNESMANN INTERNATIONAL
(CANADA) INC. AND VARSTEEL LTD.**

Appellants

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeals are allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michael Saroli
Pasquale Michael Saroli
Member

Ann Penner
Ann Penner
Member

Dominique Laporte
Dominique Laporte
Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: May 28, 2013

Tribunal Members: Serge Fréchette, Presiding Member
Pasquale Michaele Saroli, Member
Ann Penner, Member

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STATEMENT OF REASONS

SUMMARY

1. These appeals were filed by Salzgitter Mannesmann International (Canada) Inc. (Salzgitter) and Varsteel Ltd. (Varsteel) (together, the appellants) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 61(1) of the *Special Import Measures Act*.¹ They concern decisions made by the President of the Canada Border Services Agency (CBSA) on September 19, 2012, pursuant to section 59 of *SIMA*.

2. In *Carbon Steel Welded Pipe*,² the Tribunal made three exclusions to its finding of injury to the domestic industry. The exclusion that is relevant to the present proceedings was filed by Pipe & Piling Supplies Ltd. and was granted as follows:

carbon steel welded pipe in nominal pipe sizes of 1/2 inch to 6 inches inclusive, dual-stencilled to meet the requirements of both specification ASTM A252, Grades 1 to 3, and specification API 5L [collectively, the standards], with bevelled ends and *in random lengths*, for use as foundation piles.³

[Emphasis added]

3. The issue in these appeals is whether the goods imported by the appellants (the goods in issue)⁴ qualify for the exclusion. The CBSA is of the view that the goods in issue do not qualify for the exclusion because they were not imported “in random lengths”. The appellants believe that the goods in issue meet that condition. The parties agree, and the Tribunal accepts, that the goods in issue meet the other requirements of the exclusion and fall within the product definition of the goods that were the subject of *CSWP*.⁵ Accordingly, the only issue in these appeals is the meaning of the words “in random lengths”.

4. The CBSA denied the appellants the benefit of the exclusion for their importations of the goods in issue on the grounds that, “[g]iven that [they] ordered the goods in specific lengths of 40 feet and 60 feet with a tolerance of -0/+2 inches, the goods were ordered as *uniform lengths*” [emphasis added].⁶ According to the CBSA, the exclusion cannot operate if goods are imported in “specified lengths”. The CBSA’s position is that “random” means “haphazard”, and anything other than a shipment of “haphazard” lengths should be denied the benefit of the exclusion.

5. The appellants argued that the exclusion was intended to capture any and all lengths of pipe.⁷ They submitted that goods are always ordered based on certain specified lengths and tolerances and that the ordering, let alone the shipment, of “haphazard” lengths of pipe is inconceivable in industry practice and would make no commercial sense. The appellants also argued that, in any event, the goods in issue do fall within both of the applicable “random length” categories found in each of the standards. The CBSA takes the opposite view.

1. R.S.C. 1985, c. S-15 [*SIMA*].

2. (20 August 2008), Inquiry No. NQ-2008-001 (CITT) [*CSWP*].

3. *CSWP* at ii.

4. A description of the goods in issue is found in Exhibit AP-2012-047-06A, Exhibit 1 (for Salzgitter) and Exhibit 2 (for Varsteel).

5. Exhibit AP-2012-047-08A at para. 12.

6. Exhibit AP-2012-047-06A at para. 20.

7. Various descriptors were used: “miscellaneous or various lengths”, “all lengths of pipe”, “various or multiple lengths, as in to mean a variety of lengths” and “a variety of specified lengths”. *Ibid.* at paras. 23, 35, 56, 59.

6. For the reasons that follow, the Tribunal finds that the goods in issue qualify for the exclusion: they are “double random lengths”, according to ASTM A252, and “random lengths” with “otherwise agreed” tolerances, according to API 5L.

PROCEDURAL HISTORY

7. On December 20, 2012, at the request of the appellants, and with the consent of the CBSA, the Tribunal decided, pursuant to Rule 6.1 of the *Canadian International Trade Tribunal Rules*,⁸ to join the present appeals.

8. These matters were heard together at a public hearing in Ottawa, Ontario, on May 28, 2013. Mr. Christopher Poulter, President of Salzgitter, and Mr. Richard Cable, Branch Manager of Dominion Pipe and Piling, a division of Varsteel, appeared as witnesses on behalf of the appellants. The CBSA did not call any witnesses.

THE STANDARDS⁹

9. Sections 4 and 13 of ASTM A252 read as follows:

4. Ordering Information

4.1 Orders for material under this specification shall contain information concerning as many of the following items as are required to describe the desired material adequately:

- 4.1.1 Quantity (feet or number of lengths),
- 4.1.2 Name of material (steel pipe piles),
- 4.1.3 Method of manufacture (seamless or welded),
- 4.1.4 Grade (Tables 1 and 2),
- 4.1.5 Size (outside diameter and nominal wall thickness),
- 4.1.6 *Lengths (single random, double random, or uniform) (see Section 13)*,
- 4.1.7 End finish (Section 15), and
- 4.1.8 ASTM specification designation and year of issue,
- 4.1.9 Location of purchaser's inspection (see 19.1), and
- 4.1.10 Bar coding (see 22.2).

13. Lengths

13.1 Pipe piles shall be furnished in single random lengths, double random lengths, or in uniform lengths *as specified in the purchase order*, in accordance with the following limits:

Single random lengths	16 to 25 ft (4.88 to 7.62 m), incl
Double random lengths	over 25 ft (7.62 m) with a minimum average of 35 ft (10.67 m)
Uniform lengths	length as specified with a permissible variation of ± 1 in.

[Emphasis added]

10. Section 9.11 of API 5L reads as follows:

9.11 Dimensions, mass and tolerances

9.11.1 Dimensions

9.11.1.1 The pipe shall be delivered to the *dimensions specified in the purchase order*, subject to the applicable tolerances.

8. S.O.R./91-499.

9. Exhibit AP-2012-047-06A, Exhibit 5.

9.11.1.2 The specified outside diameter and specified wall thickness shall be within the applicable limits given in Table 9.

9.11.1.3 *The pipe shall be delivered in random lengths or approximate length, as specified in the purchase order.*

9.11.3.3 The tolerances for length shall be as follows.

- a) Unless otherwise agreed, random lengths shall be delivered within the tolerances given in Table 12 [table not reproduced].
- b) Approximate lengths shall be delivered within a tolerance of ± 500 mm (20 in).

[Emphasis added]

ANALYSIS

Legal Framework

11. It is well established that a determination of whether goods are of the same description as the goods to which a finding applies must be based on an examination of the characteristics of the goods, including physical description, end-use applications, interchangeability, competition in the marketplace, price and marketing.¹⁰ In certain cases, not all these factors are relevant. For instance, in some cases, goods may be described on the more limited basis of technical specifications or industry standards.¹¹ The present case is clearly in that realm.

12. The relevant point of reference is the state of the goods at the moment of importation.¹²

13. If and only if there exists an ambiguity in the wording of an exclusion, such that it is unclear, it is also well established that recourse can be had to the statement of reasons for the finding. The Federal Court of Appeal, in *Deputy M.N.R. (Customs and Excise) v. Trane Company of Canada*, stated the following:

... there is not in my opinion a clearly established principle that the reasons for decision may not be referred to in order to clarify the terms of a formal decision the precise application of which is not, as a matter of fact, clear on its face. . . . In these circumstances it is permissible to refer to the reasons of the Tribunal to determine, if possible, the application that was intended by the Tribunal.¹³

10. See, for example, *Nikka Industries Ltd. v. Deputy M.N.R.C.E.* (20 August 1991), AP-90-018 (CITT); *Macsteel International (Canada) Limited v. Commissioner of the Canada Customs and Revenue Agency* (16 January 2003), AP-2001-012 (CITT); *Zellers Inc. v. Deputy M.N.R.* (25 January 1996), AP-94-351 (CITT); *Cobra Anchors Co. Ltd. v. President of the Canada Border Services Agency* (8 May 2009), AP-2008-006 (CITT); *Aluminart Products Limited v. President of the Canada Border Services Agency* (19 April 2012), AP-2011-027 (CITT).

11. *Toyota Tsusho America, Inc. v. President of the Canada Border Services Agency* (18 November 2011), AP-2010-063 (CITT).

12. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] SCR 366. See, also, *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

13. [1982] 2 FC 194 (FCA) at 206. See, also, *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67, [2001] 4 FC 455 [*Indian Band*] at para. 38.

14. The statement of reasons will normally suffice to clarify the intended meaning of an ambiguous finding.¹⁴ If, however, a particular aspect of a Tribunal finding is not settled by reference to the statement of reasons, it may be helpful to refer to the administrative record of the proceedings that led to the finding in order to address the ambiguity.¹⁵

15. The same principles apply in determining whether goods are of the same description as the goods to which an exclusion applies.¹⁶ The starting point of this exercise remains, however, to determine whether there exists any ambiguity whatsoever in the wording of a given exclusion.

The Exclusion Is Not Ambiguous

16. In the present case, the Tribunal sees no ambiguity in the text of the exclusion. The Tribunal is of the view that it would be an error of law to limit its understanding of the words “random lengths” to their ordinary dictionary meaning, as argued by the CBSA. The exclusion incorporates by reference the standards. Both the exclusion and the standards contain the words “random lengths” (“single random lengths” and “double random lengths” in the case of ASTM A252 and “random lengths” in the case of API 5L). The words “random lengths” must therefore be understood in the technical and specialized context in which they are found. Also, the exclusion and the standards that it incorporates by reference must be read as a whole.

17. To accept the CBSA’s position would be to ascribe to those words, on the one hand, their ordinary meaning when read in the core of the exclusion, as if those words existed in a vacuum, and, on the other, their technical and specialized meaning when reading the standards, whereas the standards are found (incorporated by reference) in the very core of the exclusion itself. The Tribunal does not accept the CBSA’s dichotomous interpretative approach. The Tribunal sees no logic in reading the exclusion as if it did not contain the standards so as to ascribe different meanings to identical words used in both. Rather, because the exclusion contains the standards, the former cannot be read in isolation of the latter.

18. In fact, the exclusion contains other words that require reference to the standards in order to properly understand their meaning. For example, it would be insufficient to rely on the ordinary meaning of the word “bevelled” (“reduce (a square edge on an object) to a sloping edge”)¹⁷ to understand the meaning of the words “bevelled ends” in the exclusion. Indeed, reliance on the standards is paramount to understand the meaning of the words “bevelled ends” used in the technical and specialized context in which they are found, so as to ascertain precise values as described in the standards for such specifications as angle and tolerances, among others.

14. *BMI Canada Inc. and BMI West Inc. v. President of the Canada Border Services Agency* (2 August 2011), AP-2010-039 (CITT) at paras. 105, 107.

15. *Indian Band*. Albeit rendered in a different context, this decision of the Federal Court of Appeal supports the Tribunal’s view that, insofar as the statement of reasons is insufficient to ascertain the meaning of an ambiguous finding, documents other than the statement of reasons that were part of the administrative record, when the Tribunal made the finding, and that are directly relevant to the ambiguity at issue may be consulted to interpret the finding. By way of aside, and as a point of interest, the Tribunal’s approach is consistent with the U.S. approach in proceedings equivalent to appeals under *SIMA*. When the U.S. Department of Commerce is asked to determine whether products are subject to an anti-dumping or countervailing duty order, it starts by examining the language of the order and the description of the goods in the scope request, in light of the complaint, the record from the initial investigation and the determinations of the U.S. Department of Commerce and of the United States International Trade Commission. See 19 CFR 351.225 (d) and (k); *Walgreen Co. v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010).

16. See, for example, *Powers Industries Limited v. President of the Canada Border Services Agency* (22 April 2013), AP-2012-010 (CITT) at para. 25.

17. Oxford Dictionaries, <http://oxforddictionaries.com/definition/english/bevel>, s.v. “bevel”.

19. As was examined above, the same holds true to understand the meaning of the words “random lengths” used in the exclusion. Fundamentally, there is a symbiotic relationship between the standards and the exclusion, and it is not appropriate to divorce one from the other when reading the words that are used in the exclusion.

20. In addition, the Tribunal heard extensive and credible evidence that industry practice is in line with the usage of the terms “random lengths” as found in the standards and the exclusion.¹⁸ The Tribunal will address at greater length below the importance of a contextual reading of the words used in an exclusion order.

The Goods in Issue Are “Random Lengths”, Not “Uniform Lengths” or “Approximate Lengths”

21. The CBSA argued that the goods in issue are “uniform lengths” pursuant to ASTM A252 and “approximate lengths” according to API 5L. The Tribunal disagrees.

22. According to ASTM A252, “uniform lengths” are “length[s] as specified with a *permissible variation of ±1 [inch]*” [emphasis added]. It was not disputed that the goods in issue were ordered and imported with an acceptable variation of -0/+2 inches, or in other words up to 2 inches above *but not below* their exact minimum acceptable length of 40 or 60 feet, as the case may be. Such a variation therefore does not allow for the -1 inch variation that is provided for in the “uniform lengths” category. The goods in issue therefore are not properly described by that category.

23. According to API 5L, “[a]pproximate lengths shall be delivered within a tolerance of ±500 mm (20 [inches]).” In contrast, “random lengths” must be delivered “within the tolerances given in Table 12”. That table provides for a certain range of tolerances for each “random length designation”. However, API 5L states that the tolerances given for those random length designations can be “otherwise agreed”. That is what occurred: the goods in issue fall within the 12-metre or 40-foot random length designation and the 18-metre or 60-foot random length designation with an agreed-upon tolerance of -0/+2 inches (i.e. an agreed-upon tolerance other than the tolerances in Table 12). Consequently, the goods in issue are not “uniform lengths” as defined by API 5L.

24. In this respect, had the appellants’ suppliers delivered either “uniform lengths” or “approximate lengths”, the appellants would have been justified in rejecting such products because they would not have met the specifications that were ordered.

25. Through witness testimony, and in argument, counsel for the CBSA raised the issue of where to classify, in the standards, a hypothetical shipment containing only 34-foot pipe with a tolerance of -0/+2 inches.¹⁹ The CBSA used that example to argue that such pipe would not meet either the “single random length” designation (because longer than 25 feet) or the minimum average length of 35 feet for the “double random length” designation. As examined below, and although not accurate to demonstrate the point that the CBSA was seeking to make, this example is nevertheless useful to understand how the standards operate in order to determine whether such pipe could meet either of them.

26. Under ASTM A252, such pipe is too long to qualify as “single random lengths” (up to 25 feet). On its face, 34-foot pipe with a tolerance of -0/+2 inches would be too short to meet the minimum average of 35 feet to qualify as “double random lengths”, unless, of course, care was taken to ensure that the tolerance

18. *Transcript of Public Hearing* at 9, 28-33, 55-60, 64-65.

19. *Ibid.* at 38 and following.

of +2 inches operated in such a manner as to raise the minimum average length of the shipment to at least 35 feet. To be sure, such pipe would not qualify as “uniform lengths” because such pipe requires a permissible variation of no more than ± 1 inch and, as discussed above, such a variation is foreign to the specification of -0/+2 inches.

27. Consequently, unless the minimum average condition of 35 feet was met in the scenario discussed here, thereby ensuring description as “double random lengths” (the same would hold true for any consignment that included pipe of various lengths over 25 feet), 34-foot pipe with a tolerance of -0/+2 inches would find no place in the length categories of ASTM A252. Accordingly, such pipe would not meet the requirements of that standard because it limits certification to pipe that meets such length categories, which dictate certain specific “limits”. Such pipe would therefore be ineligible for dual stencilling as per the requirements of the exclusion because it would fail to meet a requirement of ASTM A252. Such pipe could therefore not benefit from the exclusion.

28. Under API 5L, the uncontroverted testimony that was heard by the Tribunal is to the effect that 34-foot pipes with a tolerance of -0/+2 inches are not “approximate lengths”.²⁰ The Tribunal was presented with no evidence to contradict that view, and its examination of the requirements of that standard confirms that view, as examined below.

29. That the general position advanced by the CBSA is untenable is further substantiated by what follows.

30. A plain reading of ASTM A252 shows no impediment to “uniform lengths” being within the length ranges for both “single random lengths” and “double random lengths”, as long as such pipe has a tolerance of ± 1 inch. In other words, otherwise “random” lengths (either “single” or “double”) become “uniform” lengths if they are manufactured within the tight tolerance of ± 1 inch. Such a tight tolerance is reflective of the nomenclature used: indeed, “uniform lengths” are just that—they are very uniform (to an inch above or below the exact measurement).

31. In contrast, “approximate lengths” of API 5L connote the exact opposite notion: they are 20 inches above or below a given measurement (so within a 40-inch range)—hardly what could be viewed as lengths of any exactitude.

32. Accordingly, goods cannot be, at once, both “uniform” and “approximate” in length as contemplated by ASTM A252 and API 5L, respectively. The CBSA’s position ignored these considerations.

33. The Tribunal finds that the goods in issue are “random lengths” according to the standards for the reasons that follow.

34. The Tribunal finds that the goods in issue are “double random lengths” under ASTM A252 because:

- the specified lengths of the goods in issue, i.e. 40 feet and 60 feet, are greater than the lengths applicable to the “single random lengths” category, i.e. 16 feet to 25 feet, inclusive;

20. *Ibid.* at 41.

- the specified lengths of the goods in issue, i.e. 40 feet and 60 feet, are within the lengths applicable to the “double random lengths” category, i.e. over 25 feet, and the goods in issue have an average length that is above the minimum average length required for that category, i.e. 35 feet; and
- the goods in issue have “otherwise agreed” tolerances of -0/+2 inches, which are tolerances that differ from those specified for “uniform lengths”, i.e. a permissible variation of ± 1 inch.

35. The Tribunal also finds that the goods in issue, under API 5L, are “random lengths” with “otherwise agreed” tolerances (i.e. tolerances other than those in Table 12 of that standard) because:

- the goods in issue have “otherwise agreed” tolerances of -0/+2 inches; and
- the goods in issue are in lengths, i.e. 40 feet and 60 feet, that are listed in the “random length designations” of Table 12 under section 9.11.3.3 of that standard.

Additional Remarks

36. The CBSA asserts that the inclusion of minimum average lengths in the specifications implies a variety of lengths, thereby precluding the ordering of specific lengths. The Tribunal does not agree.

37. First, it is impossible for the Tribunal to be blindly subservient to the common dictionary definition of the word “random” where the specific context of the term’s usage suggests otherwise. The ordering of pipe in lengths consistent with ordinary dictionary definitions of the term “random”²¹ would not only be inconsistent with industry needs and practice, but also with the standards themselves, which form part of the relevant interpretative context.

38. Indeed, the text of both ASTM A252 and API 5L clearly indicates that “random lengths” must be specified at the time of ordering, with section 13.1 of ASTM A252 providing that “[p]ipe piles shall be furnished in single random lengths, double random lengths, or in uniform lengths *as specified in the purchase order*” and section 9.11.1.3 of API 5L providing that “[t]he pipe shall be delivered in random lengths or approximate length[s], *as specified in the purchase order*” [emphasis added in both instances].

39. Second, it is undeniable that an element of randomness derives from the very fact that the standards provide for the realities that specified tolerances are meant to address: this is part and parcel of both industry production imperatives, as well as end-user design needs. The degree of tolerance is, in effect, a meeting of minds between industry and purchasers (who, ultimately, are serving the needs of end users), whereby a given amount of variation or randomness becomes acceptable to both manufacturer and end user for each other’s purposes.²² In that sense, a degree of randomness within tolerances is built into the standards to reflect very practical technical and commercial realities. Such a degree of randomness has nothing to do, however, with the common dictionary-based definition of “random” being espoused by the CBSA.

21. *The Concise Oxford Dictionary*, 10th ed., s.v. “random”: “**1** made...without method or conscious decision. . . . **3** . . . components of irregular size and shape”; *Collins English Dictionary*, 5th ed., s.v. “random”: “**1** lacking any definite plan or prearranged order **2b** chosen without regard to any characteristics” Exhibit AP-2012-047-08A, Tab 4.

22. *Transcript of Public Hearing* at 23, 39.

40. Third, the CBSA's literal understanding of the word "random" can only bespeak of a will to read the exclusion in isolation of commercial reality and of the very *raison d'être* of such findings under *SIMA*. The Tribunal cannot accept that position because it is not only unreasonable, but also incorrect. As evidenced by the testimony of the witnesses, the CBSA's reading of the exclusion would effectively nullify any possibility whatsoever that importers be able to avail themselves of its benefits:²³ shipments of truly random pipe, as the CBSA would have the Tribunal understand that term, simply do not occur in the day-to-day real world of commerce that this industry engages in.²⁴

DECISION

41. The appeals are allowed.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Ann Penner
Ann Penner
Member

23. *Ibid.* at 62.

24. *Ibid.* at 22, 28.