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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SAHA THAI STEEL PIPE PUB. CO.
V. UNITED STATES

May 15, 2024, Decided

2022-2181

Reporter

101 F.4th 1310 *; 2024 U.S. App. LEXIS 11726 **; 2024 WL 2166905

Prior History: [**1] Appeal from the United States Court of International Trade in No. 1:20-cv-00133-SAV, Judge Stephen A. Vaden.

Saha Thai Steel Pipe Pub. Co., Ltd. v. United States, 592 F. Supp. 3d 1299, 2022 Ct. Intl. Trade LEXIS 99, SLIP OP. 2022-99, 2022 WL 3681263 (Ct. Int'l Trade, Aug. 25, 2022)

Case Summary

Overview

HOLDINGS: [1]-U.S. Department of Commerce's scope ruling that imports of dual-stenciled pipes from Thailand fell within the scope of an existing antidumping duty order was reasonable and supported by substantial evidence including 19 C.F.R. § 351.225(k)(1) materials.

Outcome

Ordered reversed.

Counsel: JAMES P. DURLING, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, argued for plaintiff-appellee. Also represented by JAMES BEATY, DANIEL L. PORTER.

CHRISTOPHER CLOUTIER, Schagrin Associates, Washington, DC, argued for defendant-appellant. Also represented by MICHELLE ROSE AVRUTIN, NICHOLAS J. BIRCH, ELIZABETH DRAKE, WILLIAM ALFRED FENNELL, JEFFREY DAVID GERRISH, LUKE A. MEISNER, ROGER BRIAN SCHAGRIN.

Judges: Before LOURIE, REYNA, and CHEN, Circuit Judges. Opinion for the court filed by Circuit Judge REYNA. Dissenting opinion filed by Circuit Judge CHEN.

Opinion by: REYNA

Opinion

[*1314] REYNA, *Circuit Judge*.

Wheatland Tube Company appeals a decision of the U.S. Court of International Trade, which affirmed the U.S. Department of Commerce's remand determination as to the scope of an antidumping duty order concerning certain steel pipes imported from Thailand. For the following reasons, we reverse.

Background

This appeal concerns whether certain imports of steel pipes from Thailand fall within the scope of an existing antidumping duty order. As background, we provide a brief overview of the antidumping duty framework [**2] and the initial, underlying antidumping duty investigation, before turning to the scope of the order at issue.

The U.S. trade statutes generally provide that an interested party may petition the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC") to initiate antidumping duty investigations and, if the investigations result in affirmative determinations, impose antidumping duties on the particular imported merchandise that

was subject to the investigations. 19 U.S.C. §§ 1673,[1] 1673a(b). Commerce's role in an antidumping investigation is to determine whether the merchandise subject to the investigation (subject merchandise) is being, or likely to be, sold in the United States at less-than-fair-value ("LTFV"), an unfair trade practice commonly referred to as dumping. *Id.* §§ 1673, 1673b(b)(1)(A). Concurrently, the ITC investigates whether a U.S. domestic industry producing like or similar merchandise as those under Commerce's investigation is materially injured, or threatened with material injury, by virtue of the dumped imports. *Id.* [*1315] §§ 1673, 1673b(a)(1)(A). If Commerce's and the ITC's investigations both lead to affirmative final determinations, namely Commerce's final LTFV determination and the ITC's final determination [**3] of material injury or threat of material injury, Commerce issues an antidumping duty order imposing antidumping duties on the imports of the subject merchandise. *Id.* §§ 1673, 1673d(c)(2).

An antidumping duty order describes the specific merchandise subject to the order and antidumping duties. This description is paramount. Given the realities in the marketplace and everchanging varieties of merchandise, questions frequently arise as to whether a particular product is subject to or falls

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[1] Section 731 of the Tariff Act of 1930, codified in 19 U.S.C. § 1673, sets forth the general framework for the imposition of antidumping duties.

within the scope of an antidumping duty order. 19 C.F.R. § 351.225(a). Consequently, U.S. trade law provides that an interested party may request that Commerce issue a scope ruling to clarify whether a particular product falls within the scope of the order. *Id.* This appeal involves such a ruling.

I. The Initial Antidumping Duty Investigation

In February 1985, a coalition of domestic manufacturers of steel pipes, including Appellant Wheatland Tube Company ("Wheatland"), petitioned Commerce and the ITC to initiate antidumping duty investigations on certain circular welded carbon steel pipes and tubes ("CWP") imported from Thailand. *Petition for the Imposition of Antidumping Duties[:] Certain Welded Carbon Steel Circular Pipes and Tubes from Thailand [**4]* (Feb. 28, 1985), J.A. 40519-56.[2] The petition identified Thai manufacturers producing the imported pipes, including Appellee Saha Thai Steel Pipe Public Company Limited ("Saha"). J.A. 40563.

In the original February 1985 petition, as required under the regulations, the petitioners provided a

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[2] Typically, petitioners requesting the initiation of an antidumping duty investigation simultaneously request the initiation of a countervailing duty investigation, as was the case here. *See, e.g.*, J.A. 40519. This appeal is limited to the scope of the antidumping duty order resulting from the antidumping duty investigation.

detailed description of goods the petitioners believed should be investigated, including their technical characteristics, uses, and tariff classifications. J.A. 40536-39. Specifically, the petition asserted that the subject merchandise was "certain circular welded carbon steel circular pipes and tubes, .375 inch or more but not over 16 inches in outside diameter." J.A. 40536. The petition continued to state,

> The product *includes "standard pipe,"* which is a general-purpose commodity used in such applications as plumbing pipe, sprinkler systems and fence posts and is commonly referred to in the industry as a standard pipe. . . . (These products are generally produced to [the American Society for Testing & Materials ("ASTM")] specifications A-120, A-53, or A-135.) The product *also includes "line pipe,"* which is produced to [the American Petroleum Institute ("API")] specifications for line pipe, [**5] API-5L or API5X.[3]
>
> . . . Small diameter pipes with a wall thickness greater than .065 inch are now classified [under the Tariff Schedules of the United States Annotated ("TSUSA")] in 610.3208, 610.3209, 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, and

[3] As noted *infra*, ASTM and API are both industry standards organizations in the steel industry.

> 610.3258. Circular pipe with a wall thickness less than .065 inch is now classified in 610.4925.

[*1316] J.A. 40536-37 (emphasis added). According to the petition, the subject merchandise was produced using the same process worldwide, and the finished products were identical. J.A. 40538-39; *see also* J.A. 40537-38 (quoting description of the manufacturing process the ITC formulated in previous CWP investigations).

The petition described the U.S. domestic industry producing the subject merchandise as consisting of U.S. producers of *both* standard pipes and line pipes. J.A. 40545-46. Most domestic producers, according to the petition, produced both standard and line pipes using the same equipment. *Id.*

In March 1985, the petitioners partially withdrew their petition "insofar as they concern *line pipe*, TSUS numbers 610.3208 and 3209."[4] J.A. 40612 (emphasis added). According to the petitioners, they had ascertained that no Thai company was licensed at that time to produce steel pipes to API specifications. [**6] *Id.* Despite the partial withdrawal, the petitioners maintained that "the appropriate domestic industry for injury

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[4] Relevant here, under the TSUSA (1985), line pipes conforming to API specifications would be classified under items 610.3208 and 3209. *See* J.A. 40212.

determination purposes [was] the industry producing [both] standard and line pipe[s].” J.A. 40613.

Commerce and the ITC initiated and conducted their respective investigations. See *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Initiation of Antidumping Duty Investigation*, 50 Fed. Reg. 12068, 12608 (Mar. 27, 1985) (“*Commerce Initiation Notice*”); *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, 50 Fed. Reg. 10866, 10866 (Mar. 18, 1985). Commerce’s LTFV investigation reached an affirmative preliminary determination in September 1985, and an affirmative final determination in January 1986. *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Preliminary Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 40427, 40428 (Oct. 3, 1985); *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3384, 3384 (Jan. 27, 1986) (“*Final LTFV Determination*”). In the *Final LTFV Determination*, Commerce described the subject merchandise under its investigation as encompassing

> certain circular welded carbon steel pipes and tubes, also known as “standard pipe” or “structural tubing,” which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, or any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252,

> 610.3254, 610.3256, 610.3258 and 610.4925 of the *Tariff Schedules of the United States Annotated*.

Final LTFV Determination, 51 Fed. Reg. at 3384. Commerce determined that imports of the subject merchandise from Thailand were being, or were likely to be, sold in the United States at less than fair value. *Id*.

The ITC's injury investigation resulted in an affirmative [**7] preliminary determination in April 1985. *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, Determinations of the Commission*, Inv. Nos. 701-TA-242, 731-TA-252, -253, USITC Pub. 1680 (Apr. 1985) (Preliminary) ("*Preliminary Injury Determination*"). Subsequently in February 1986, the ITC issued an affirmative final determination that the investigated imports from Thailand materially injured or threatened material injury to a domestic industry. *Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand, Determinations of the Commission*, Inv. Nos. 701-TA-253, 731-TA-252, USITC [*1317] Pub. 1810 (Feb. 1986) (Final) ("*Final Injury Determination*"). In the *Final Injury Determination*, the ITC evaluated the injury effects of standard pipes imported from Thailand, and the injury effects of both standard pipes and line pipes imported from Turkey. *Id.* at I-1, II-1.

Following its practice in previous CWP investigations, the ITC treated standard and line pipes as two

separate like products, and correspondingly, found two domestic industries, a domestic standard pipe industry and a domestic line pipe industry. *Final Injury Determination at 6-7; see also Preliminary Injury Determination [**8]* at 6-8. The ITC concluded that "domestically produced standard pipe[s] [were] like imported standard pipe[s]" and that the domestic standard pipe industry included domestic producers of standard pipes, some of which simultaneously produced line pipes. *Final Injury Determination* at 6-7, I-5-I-6, II-4; *see also Preliminary Injury Determination* at 8-9, A-8—A-9.

In its analysis, the ITC described how steel pipes are manufactured, used, and classified in the industry. *Final Injury Determination* at I-1 & n.1 (referencing product description in a previous investigation involving steel pipes from Korea), II-1. The ITC explained that in the industry, steel pipes can be divided based on the method of manufacture, welded or seamless, and each category can be further divided based on the grades of steel.[5] *Id.* at I-1. Relevant here, the American Iron & Steel Institute distinguishes among various pipes based on six end uses, including standard pipes, line pipes, mechanical tubing, and others.[6] *Id.* Additionally, steel pipes are generally

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[5] In the steel industry, for the most part, the terms "pipes" and "tubes" can be used interchangeably. *Final Injury Determination* at I-1. The parties generally refer to the products at issue in this case as "pipes," and we do the same.

[6] Standard pipes are generally used for "the low-pressure conveyance of water, steam, natural gas, air, and other liquids

produced to standards, or specifications, established by industry standards organizations such as ASTM and API. *Id.* Each specification has its corresponding requirements [**9] for chemical and mechanical characteristics, which a product must satisfy in order to comply with that specification. *Id.* at I-2, II-1.

For the standard pipes under its investigation, the ITC stated,

> [t]he imported pipe and tube products that are the subject of these investigations are circular welded carbon steel pipes and tubes over 0.375 inch but not over 16 inches in outside diameter, which are *known in the industry as standard pipes* and tubes. . . . They are most commonly produced to ASTM specifications A-120, A-53, and A-135.

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and gases," such as in plumbing and heating systems and air-conditioning units. *Final Injury Determination* at I-1. Line pipes are used for "the transportation of gas, oil, or water, generally in pipeline or utility distribution systems." *Id.* at II-1.

The manufacturing processes for line pipes and standard pipes are nearly identical, and they can be produced using the same equipment. *Id.* The principal difference between the two is that line pipes are made of higher-grade steel and may require additional testing to ensure conformance to API specifications. *Id.* The ITC provided similar comparative descriptions of standard pipes and line pipes in its *Preliminary Injury Determination*. *See Preliminary Injury Determination* at A-5-A-8.

Id. at I-1-I-2 (emphasis added). The ITC concluded that "an industry in the United States [was] materially injured, or threatened with material injury, by reason of imports from Thailand of welded carbon steel standard pipes and tubes," which Commerce found to be sold in the United States at less than fair value. *Id.* at 2.

[*1318] **II. The Thailand Antidumping Duty Order**

In March 1986, following the affirmative final determinations of Commerce and the ITC, Commerce issued the Thailand antidumping duty order, imposing antidumping duties on standard [**10] pipes imported from Thailand. *Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes from Thailand, 51 Fed. Reg. 8341, 8341 (Mar. 11, 1986)* ("Thailand Order" or "Order"). According to the scope language of the Order,

> [t]he products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches, of any wall thickness.
>
> These products, which are commonly referred to in the industry as "*standard pipe*" or "structural tubing" are hereinafter designated as "pipes and tubes."

> The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes of U.S. Customs and Border Protection (CBP), the written description of the merchandise subject to the order is dispositive.

J.A. 40763 (citations omitted) (paragraphing and emphasis added); *see also Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Preliminary Results of Antidumping Duty Administrative Review, 55 Fed. Reg. 42596, 42596* (*Oct. 22, 1990*) ("*1990 Administrative Review*").

In 1989, the scope language in the 1986 Order was updated to conform to the new tariff nomenclature framework, the Harmonized Tariff Schedule of the United States ("HTSUS").[7] *See 1990 Administrative*

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[7] As originally issued in 1986, the Thailand Order provides,

> [t]he products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as "pipes and tubes"), also known as "standard pipe" or "structural tubing," which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the *Tariff Schedules of the United States Annotated* (TSUSA).

Review, 55 Fed. Reg. at 42596 (noting the 1989 transition to the HTSUS). As shown above, the current scope language maintains the same physical description of the subject merchandise and lists tariff [**11] codes under the new HTSUS framework. The Order also clarifies that "the written description of the merchandise subject to the order is dispositive," and the listed tariff codes are "provided for convenience and purposes of" the U.S. Customs and Border Protection ("CBP"). J.A. 40763; *1990 Administrative Review, 55 Fed. Reg. at 42596* ("The written product description remains dispositive.").

Consequently, all standard pipes imported from Thailand and falling within the scope of the Order became subject to antidumping duties.

III. The Present Case

In January 2019, Wheatland, along with a group of other domestic producers, filed a request with Commerce seeking an antidumping circumvention ruling against Saha. J.A. 10169. The domestic producers alleged that Saha was exporting "standard pipe[s] with minor alterations in form or appearance" or "misclassified as line [**12] pipe[s]" that circumvented the Thailand [*1319] Order and evaded antidumping duties. J.A. 10171-72, 10172 n.1. The domestic producers' request covered what is

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51 Fed. Reg. at 8341.

central to this appeal, dual-stenciled pipes.[8] J.A. 10173. According to the domestic producers, the specifications for standard pipes and line pipes "often require engineering characteristics that overlap," so a pipe may be dual-stenciled or dual-certified. *Id.* That is, such pipes were "stamped to indicate compliance with" both an ASTM specification and an API specification. *Id.* (citing *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532-534, -536, USITC Pub. 4754 (Jan. 2018) ("*Fourth Sunset Review*")).

Commerce initiated a scope inquiry to determine whether "line pipe" and "dual-stenciled standard and line pipe" were covered by the Thailand Order. J.A. 40631. With respect to the latter, Commerce explained that standard pipes may be "dual-stenciled," namely "identified to indicate compliance with two different specifications, as conforming to industry standards for both standard pipe[s] and line pipe[s]." J.A. 40635. [**13] Before Commerce, Saha argued that the Thailand Order did not cover line pipes because during the initial 1985-86 antidumping duty investigation, the petitioners partially withdrew their petition concerning line pipes from Thailand. J.A.

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[8] The domestic producers' request broadly covered pipes produced by Saha and identified as "line pipe[s]," which included pipes singularly stenciled as line pipes and those dually stenciled as both standard and line pipes. See J.A. 10173-76; see also J.A. 40631-32.

40769. To Saha, *all* line pipes, including those dual-stenciled as both standard and line pipes, were excluded from the scope. *Id.*

A. Commerce's Scope Ruling

In June 2020, Commerce reached a final scope ruling, which determined that the Thailand Order did not cover line pipes, and thus Saha's line pipes did not fall within the scope of the Thailand Order. *Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand*: *Final Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe*, J.A. 40762-80 ("*Scope Ruling*"). Commerce determined, however, that the Thailand Order covered dual-stenciled pipes so that the imports of Saha's dual-stenciled pipes fell within the scope of the Order and were subject to antidumping duties.[9] J.A. 40780.

In reaching its determination, Commerce first looked to the scope language of the Order covering "circular welded carbon steel pipes and tubes," commonly referred to as "standard pipe[s]," "limited by the dimensional [**14] requirements stated in the scope of the Order." J.A. 40763; J.A. 51. While the Order did not cover "line pipe[s]," Commerce determined that the Order included dual-stenciled pipes. J.A. 40775.

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[9] The focus of the proceedings before the Court of International Trade and the instant appeal before this court is whether dual-stenciled pipes fall within the scope of the Thailand Order. Commerce's determination that line pipes fall outside of the scope of the Thailand Order is not at issue in this appeal.

Commerce reasoned that dual-stenciled pipes were certified as "standard pipe[s]" under ASTM specifications and that they also met the physical description of merchandise included in the scope of the Order. *Id.*; J.A. 51. To Commerce, if a pipe is certified as "standard pipe," it is "standard pipe" and subject to the Order "regardless of whether it is also certified as line pipe." J.A. 40775.

Commerce next examined the criteria listed in 19 C.F.R. § 351.225(k)(1) (2020),[10] [*1320] the so-called (k)(1) factors or (k)(1) materials, and other evidence, and it found the record information did not support that dual-stenciled pipes were not covered by the Order. *See* J.A. 40773-78; J.A. 51-53. Commerce considered that the petitioners withdrew their petition concerning line pipes from Thailand and that both Commerce's and the ITC's investigations were limited to standard pipes and did not cover line pipes. J.A. 40773-75. Commerce determined that dual-stenciled pipes were not excluded. J.A. 40775. Commerce reasoned that, in contrast to [**15] other CWP investigations leading to orders that explicitly

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[10] Under 19 C.F.R. § 351.225(k)(1) (2020), in determining whether a particular product falls within the scope of an order, "[Commerce] will take into account the following: (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." The regulation has since gone through revision. Because the 2020 version governs at time relevant to this case, parties cite to this version and we do the same.

excluded dual-stenciled pipes, here neither Commerce's *Final LTFV Determination* nor the ITC's *Final Injury Determination* addressed dual-stenciled pipes. *Id.* Commerce thus found no basis in these determinations to find that dual-stenciled pipes were excluded from the resulting Thailand Order. *Id.*; J.A. 51.

Commerce rejected Saha's reliance on certain isolated statements in the ITC's sunset reviews evaluating various CWP orders, including the orders concerning imports from other countries, such as Brazil, Korea, Mexico, and Venezuela. J.A. 40776-77. Sunset reviews refer to the periodic evaluations of antidumping and countervailing duty orders to determine whether the orders should remain in place. *See* 19 U.S.C. § 1675(c). Since the sunset review process was established, the ITC has conducted four sunset reviews of various CWP orders.[11] Commerce explained that the sunset reviews simultaneously assessed various existing

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[11] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -276, -277, -296, -409, -410, -532-534, -536, -537, USITC Pub. 3316 (July 2000) ("*First Sunset Review*"); Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -409, -410, -532-534, -536, USITC Pub. 3867 (July 2006) ("*Second Sunset Review*"); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532-534, -536, USITC Pub. 4333 (June 2012) ("*Third Sunset Review*"); Fourth Sunset Review, USITC Pub. 4754.

CWP orders: some explicitly excluded dual-stenciled pipes while others, such as the Thailand Order, did not. J.A. 40776-77.[12] Commerce reasoned that the ITC's statements must be viewed in context and not as mechanically and equally [**16] applicable to *all* orders under review. J.A. 40776. In other words, each CWP order stands alone and certain language in one order does not "dispositively provide meaning to an order which does not include the same language." *Id.*

Further, Commerce found unsubstantiated Saha's claim that the petitioners had intended to exclude dual-stenciled pipes from the initial investigation underlying the Thailand Order. J.A. 40778. Saha based its claim on its view of the petitioners' interest and involvement in *other* CWP investigations, which occurred *years or decades later*. *See id.* Commerce determined that Saha's interpretation of the petitioners' intentions in the initial investigation leading to the instant Order were [*1321] "mere speculation" and lacked support in the record. *Id.*

Accordingly, Commerce issued [**17] a *Scope Ruling* concluding that although line pipes were not covered, dual-stenciled pipes were within the scope of the Thailand Order.

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[12] For example, Commerce pointed out that the antidumping duty orders on standard pipes imported from Brazil, Korea, Mexico, and Venezuela explicitly state: "Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is [] not included in these orders." J.A. 40775 n.89.

B. Saha I

Saha appealed Commerce's Scope Ruling to the U.S. Court of International Trade. *Saha Thai Steel Pipe Pub. Co. v. United States*, 547 F. Supp. 3d 1278, 1281, SLIP OP. 2021-135 (Ct. Int'l Trade 2021) ("*Saha I*"). The Court of International Trade found Commerce unlawfully expanded the scope of the Thailand Order by determining that it covered dual-stenciled pipes. *Id.* To the Court of International Trade, the Thailand Order's scope language did not address "dual-stenciled pipes," so it was unclear what qualified as "standard pipe[s]" under the Order. *Id.* at 1293-94. The Court of International Trade then reviewed the (k)(1) materials and concluded they did not support Commerce's determination that the dual-stenciled pipes fell within the scope of the Order. *Id.* at 1294-99.

In reaching its conclusion, the Court of International Trade relied on the petitioners' partial withdrawal during the initial 1985-86 investigation, which in the court's view, also withdrew dual-stenciled pipes. *Id.* at 1295. To the Court of International Trade, by withdrawing "[their] petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209," the petitioners "withdrew all pipes that were importable under 610.3208 and 3209 from consideration by the ITC [**18] and Commerce." *Id.* This withdrawal, the Court of International Trade continued, encompassed dual-stenciled pipes because they would have been imported under "TSUS numbers 610.3208 and 3209." *Id.* Accordingly, the Court of International Trade

concluded that dual-stenciled pipes were not included in the subsequent injury investigation conducted by the ITC and hence omitted from the resulting Thailand Order. *Id.* at 1295-96.

The Court of International Trade asserted that its conclusion was supported by the ITC's sunset reviews. *Id.* at 1297. In the Court of International Trade's view, the ITC consistently treated dual-stenciled pipes as line pipes, and its sunset reviews referenced exclusions of dual-stenciled pipes from CWP orders. *Id.* The Court of International Trade noted that the First and Second Sunset Reviews discussed dual-stenciled pipes only in the context of a "safeguard" remedy, where President Clinton imposed increased duties on line pipe imports as defined in his proclamation.13 *Id.*; see Second Sunset Review at Overview-5 n.16 (commenting that the safeguard measure covered "dual-stenciled" pipes but excluded "arctic grade" line pipes). The Court of International Trade also considered that the *Third and Fourth Sunset Reviews* [**19] included a statement that "[d]ual-stenciled pipe, which enters as line pipe under a different subheading of the [HTSUS] for U.S. customs purposes, is not within the scope of the orders." *Saha I*, 547 F. Supp. 3d at 1297-98 (alteration

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[13] In March 2000, President Clinton issued Proclamation No. 7274, 65 Fed. Reg. 9193 (Feb. 23, 2000), imposing additional duties on line pipe imports over certain quantities each year from each supplying country for a period of three years, excluding those from Mexico and Canada.

in original) (first citing Fourth Sunset Review at 6-7; and then citing *Third Sunset Review* at 8). The Court of International Trade considered this statement as "unqualified and [giving] no indication that the scope language d[id] not apply to the Thailand Order." *Id.*

[*1322] The Court of International Trade thus remanded to Commerce to reconsider its Scope Ruling based on the court's analysis. *Id.* at 1299.

C. Saha II

On remand, to comply with the remand order, Commerce concluded, under protest, that the Thailand Order did not cover dual-stenciled pipes. *Final Results of Redetermination Pursuant to Court Remand*, J.A. 46-73 ("*Remand Determination*"). "Under protest" means that the Court of International Trade's decision dictated that Commerce reach a result that is contrary to what it would have reached absent the Court of International Trade's directive. *Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) ("*Meridian II*"). In its *Remand Determination*, Commerce affirmed its reasoning as stated in its *Scope Ruling* and expressed various concerns it had with the Court of International Trade's [**20] analysis. J.A. 59-65. Commerce believed that the Court of International Trade misunderstood the ITC's injury findings and ignored relevant statements in the ITC's sunset reviews that detracted from the Court of International Trade's

conclusion. J.A. 61-65; *see also* J.A. 63-64 (noting ITC statements that CWP orders have varying scopes).

The Court of International Trade sustained Commerce's *Remand Determination*, namely the conclusion that dual-stenciled pipes were not covered by the Thailand Order. *Saha Thai Steel Pipe Pub. Co. v. United States*, 592 F. Supp. 3d 1299, 1301, SLIP OP. 2022-99 (Ct. Int'l Trade 2022) ("*Saha II*"). In its decision, the Court of International Trade maintained its reasoning in *Saha I*, stressing (1) its view that the petitioners' partial withdrawal concerning line pipes during the initial investigation encompassed dual-stenciled pipes; and (2) its view that the ITC consistently identified dual-stenciled pipes as line pipes. *Id.* at 1305, 1312-13. The Court of International Trade concluded that Commerce's *Remand Determination* properly complied with its remand order in finding dual-stenciled pipes not included in the Thailand Order. *Id.* at 1313.

Wheatland appeals, contending that Commerce's *Scope Ruling* was correct and should have been affirmed by the Court of International Trade. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

Standard of [21] Review**

We review the Court of International Trade's decisions de novo, applying the same standard of review used by the Court of International Trade in reviewing Commerce's scope rulings. *Shenyang*

Yuanda Aluminum Indus. Eng'g Co. v. United States, 776 F.3d 1351, 1354 (Fed. Cir. 2015). We affirm Commerce's scope ruling unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001).

In our review, we accord deference to Commerce's own interpretation of its antidumping duty orders. *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). This deference is appropriate because determinations as to the meaning and scope of antidumping duty orders are matters "particularly within the expertise" of Commerce and its "special competence." *Id.* (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998)). Our caselaw has also recognized that in conducting our review, we pay due respect to and "will not ignore the informed opinion of the Court of International Trade." *Suramerica de Aleaciones [*1323] Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

Under the substantial evidence review standard, even if an inconsistent conclusion could be drawn from the record, "such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United*

States, 261 F.3d 1371, 1376 (Fed. Cir. 2001). A party challenging Commerce's scope [**22] ruling under the substantial evidence standard "has chosen a course with a high barrier to reversal." *King Supply*, 674 F.3d at 1348 (quoting *Nippon Steel*, 458 F.3d at 1352).

Discussion

I. Legal Framework

There is no specific statutory provision that governs the interpretation of the scope of an antidumping duty order. *Shenyang Yuanda*, 776 F.3d at 1354. The regulations provide an analytical framework guiding Commerce's reasoning and analysis in reaching a scope ruling. *Id*. Under the applicable regulations at the time of Commerce's scope ruling, 19 C.F.R. § 351.225(k) (2020),[14] in considering whether a

[14] In 2021, Commerce amended various sections of its regulations concerning antidumping and countervailing duties, including the regulations on scope rulings. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52300 (Sept. 20, 2021) ("*2021 Revised Regulations*"). As amended, effective November 4, 2021, 19 C.F.R. § 351.225(k) provides,

> (1) In determining [**23] whether a product is covered by the scope of the order at issue, [Commerce] will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.

particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC].

(2) When the above criteria are not dispositive, [Commerce] will further consider:

(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

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(i) The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of [Commerce]: (A) The descriptions of the merchandise contained in the petition pertaining to the order at issue; (B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue; (C) Previous or concurrent determinations of [Commerce], . . . ; and (D) Determinations of the [ITC] pertaining to the order at issue, ...

(ii) [Commerce] may also consider secondary interpretive sources . . . .

manner in which the product is advertised and displayed.

This court has considered the tiered analysis framework in its review of Commerce's scope rulings. E.g., *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) ("*Meridian I*"); *Shenyang Yuanda*, 776 F.3d at 1354; *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). We have long recognized that the scope language of the order is the "cornerstone" of this analysis and "a predicate for the interpretive process." *Duferco Steel*, 296 F.3d at 1097. [*1324] Although the scope of the order can be clarified, the scope language [**24] cannot be interpreted or "changed in a way contrary to its terms." *Id.* (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)).

While the terms of the order describe the merchandise within the scope of the order, they may also expressly describe merchandise that, for whatever reason, is excluded from the scope. Hence, the parties may argue that a particular product is not within the scope on the ground that it falls within an explicit exclusion expressed in the order. See, e.g., *Meridian I*, 851 F.3d at 1379 (parties disputing whether merchandise at issue fell within express exclusions of the order); *Shenyang Yuanda*, 776 F.3d at 1358 (same); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998) (same). But, here, the Order contains no such express exclusions.

In addition, antidumping duty orders list tariff codes relevant to the merchandise subject to the orders or subject to the explicit exclusions in the orders, which the CBP references in regulating imports as they enter the U.S. border.[15] Consequently, antidumping duty orders generally contain instructions that the tariff codes are for purposes of the CBP, and "the written description of the merchandise subject to the order is dispositive."[16]

Again, as the above indicates, Commerce must begin a scope determination inquiry with a review of the scope language of the order. *Shenyang Yuanda*, 776 F.3d at 1354 [**25] . In doing so, Commerce considers how the scope language of the order describes the subject merchandise it covers. *E.g.*, *Mid Continent*

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[15] J.A. 40763; *see, e.g., Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Anti-dumping Duty Order*, 77 Fed. Reg. 73018, 73019 (Dec. 7, 2012), discussed in *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1304 (Fed. Cir. 2020); *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16223, 16223-24 (Mar. 30, 2005), discussed in *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1353 (Fed. Cir. 2010); *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China*, 64 Fed. Reg. 8308, 8309 (Feb. 19, 1999), discussed in *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005).

[16] *See* exemplary orders identified in *supra* note 15.

Nail Corp. v. United States, 725 F.3d 1295, 1303 (Fed. Cir. 2013). If the scope language expressly and dispositively resolves whether the subject merchandise falls within or outside of the scope, the scope analysis comes to an end. *Id.*[17]

If the scope language itself does not clearly answer the scope question, Commerce continues its interpretation to understand the meaning of the scope language by consulting criteria identified in 19 C.F.R. § 351.225(k)(1) (2020), the so-called (k)(1) factors or (k)(1) materials. See, e.g., *Meridian I*, 851 F.3d at 1382. The (k)(1) materials include "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the [*1325] determinations of [Commerce] (including prior scope determinations) and the [ITC]." 19 C.F.R. § 351.225(k)(1) (2020). While these materials do not substitute for the scope language, they reflect the historical context and may provide "valuable guidance" for the interpretation of the order. *Duferco Steel*, 296 F.3d at 1097.

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[17] Cf. 2021 Revised Regulations, 86 Fed. Reg. at 52322 (Commerce commenting that "in most straightforward cases, the agency is not required to consider the four listed (k)(1) interpretative sources if such an analysis would waste agency time and resources"); 19 C.F.R. § 351.225(k) ("In determining whether a product is covered by the scope of the order at issue, [Commerce] . . . may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.").

The (k)(1) materials cannot control or alter the scope language of the order. Rather, they serve as interpretative aids that clarify or support Commerce's understanding of the scope language that Commerce may arrive at upon reviewing the scope language itself. For instance, in *Meridian I*, the parties disputed whether Commerce erred in its interpretation of the exclusionary term "finished goods kit" [**26] in the scope language. *Meridian I*, 851 F.3d at 1384. We concluded that Commerce correctly interpreted that exclusionary term and that its determination was further supported by the (k)(1) materials. *Id.* In King Supply, similarly, we determined that Commerce reasonably read the disputed language at issue as not constituting an enduse restriction, and that the (k)(1) materials supported that reading. *King Supply*, 674 F.3d at 1350-51. We thus held that Commerce's scope ruling was supported by substantial evidence and reversed the Court of International Trade's judgment to the contrary. *Id.* at 1351.

In cases where an analysis of the (k)(1) materials is still not dispositive, Commerce may proceed to consider the factors listed under 19 C.F.R. § 351.225(k)(2) (2020), the so-called (k)(2) factors. *Shenyang Yuanda*, 776 F.3d at 1354; see also *id.* at 1358 (declining to consider the (k)(2) factors because the scope language read in the context of the (k)(1) materials proved dispositive). These factors include the "physical characteristics of the product," the "expectations of the ultimate purchasers," the "ultimate use of the product," and the relevant

"channels of trade" and manner of marketing. 19 C.F.R. § 351.225(k)(2) (2020).

Thus, depending on the clarity of the scope language relative to the merchandise at issue, a scope analysis may encompass varying sources. [**27] Consequently, scope analysis is "highly fact-intensive and case-specific." *King Supply*, 674 F.3d at 1345.

II. Analysis

We now turn to the principal issue of this appeal: whether the Thailand Order on "standard pipes" covers Saha's "dual-stenciled pipes," namely pipes certified as "standard pipes" and concurrently as "line pipes."

As noted *supra*, Commerce's *Scope Ruling* determined that the Order covered dual-stenciled pipes. The Court of International Trade, in sustaining Commerce's *Remand Determination*, reached the opposite conclusion finding dual-stenciled pipes excluded from the Order. On appeal, Wheatland contends that the Court of International Trade erred in its analysis and should have affirmed Commerce's determination in its *Scope Ruling*. Saha argues in favor of the Court of International Trade's affirmance of Commerce's *Remand Determination*. For the reasons discussed below, we hold that Commerce's determination that imports of dual-stenciled pipes from Thailand are within the scope of the Thailand Order on standard pipes is supported by substantial

evidence. As a result, we reverse the judgment of the Court of International Trade that affirmed Commerce's *Remand Determination*.

Before turning to the scope language, we first address [**28] Wheatland's contention that Commerce "impermissibly relied on (k)(1) factors" in reaching its *Scope Ruling*. Appellant Br. 21-23. Commerce, in its *Scope Ruling*, rejected Wheatland's similar [*1326] contention raised below. J.A. 40768. We conclude that Commerce properly considered the (k)(1) materials in reaching its *Scope Ruling*.

As Commerce pointed out, the applicable regulations provide that Commerce, in reaching a scope ruling, "will take into account" the (k)(1) materials. 19 C.F.R. § 351.225(k) (2020). Thus, the regulations at least *permit*, if not mandate, Commerce to consider the (k)(1) materials. Further, where, as here, the parties explicitly rely on the (k)(1) materials for their contradictory interpretation of an order, Commerce cannot arbitrarily ignore those arguments and evidence on the record. *See* 19 U.S.C. § 1516a(b). If Commerce were to reject a contrary contention allegedly supported by the (k)(1) materials, Commerce must adequately explain its reasoning for that rejection. *See, e.g., CP Kelco US, Inc. v. United States*, 949 F.3d 1348, 1356 (Fed. Cir. 2020). Commerce properly did so here.

We note the Court of International Trade's observation that this court "arguably" provided two

"distinct methods" to determine "whether a scope's language is sufficiently ambiguous that Commerce must resort to additional documents" to interpret [**29] an antidumping duty order. *Saha I*, 547 F. Supp. 3d at 1289 (first citing *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020); and then citing *Meridian II*, 890 F.3d at 1277)). According to the Court of International Trade, under the *OMG* approach, "the first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous;" and Commerce considers the (k)(1) materials if "the language is ambiguous." *Id.* at 1289-90. The second approach, according to the Court of International Trade, is the *Meridian* approach. *Id.* at 1290. In the Court of International Trade's view, under the *Meridian* approach, when "reviewing the plain language of a duty order" to determine whether it is ambiguous, Commerce must consider the (k)(1) materials. *Id.*

As we outlined above, there is only one framework which, as both the *OMG* and *Meridian* decisions stress, *begins* with a review of the scope language *itself*. *OMG*, 972 F.3d at 1363; *Meridian II*, 890 F.3d at 1277; *Meridian I*, 851 F.3d at 1381. And if the scope cannot be clearly and dispositively discerned based on the scope language itself, Commerce must turn to the aid of the (k)(1) and, if still necessary, (k)(2) sources. *See, e.g., OMG*, 972 F.3d at 1363; *Meridian I*, 851 F.3d at 1382. In other words, the (k)(1) materials are interpretive tools that, where needed, help clarify what the scope language means relative to the scope

question at issue, namely whether a particular product falls [**30] within the scope. But this assistance may be unnecessary if the scope language *itself* answers that scope question and thus needs no further interpretation. We note that in Commerce's recent effort to clarify the regulatory framework, Commerce expressed a similar understanding based on its practice, as now codified in the revised regulations. 2021 Revised Regulations, 86 Fed. Reg. at 52323. The current regulations clarify that the traditional (k)(1) materials are "primary interpretive sources" that Commerce may consider "at [its] discretion," if it determines the scope language itself does not clearly and sufficiently answer the scope question. 19 C.F.R. § 351.225(k)(1)(i). The current regulations also list other "secondary interpretative sources" that Commerce "may also consider," as well as the hierarchy of these interpretative sources. *Id.* § 351.225(k)(1)(ii).

Practically, because the scope language is necessarily written in general terms, Commerce will *likely* consider the (k)(1) materials to assist in understanding the meaning of the scope language relevant to the determination of whether a [*1327] particular product is within the scope. *See* 2021 Revised Regulations, 86 Fed. Reg. at 52323 (noting that "in the majority of scope inquiries, it is likely that the current (k)(1) sources would be considered" in reaching a scope ruling). [**31] This is particularly true where, as here, a scope ruling is

requested, subsequently disputed, and eventually appealed to this court.

A. The Scope Language Covers Dual-Stenciled Pipes

We now turn to reviewing the scope language at issue. We find that in its *Scope Ruling*, Commerce reasonably interpreted the Thailand Order's scope as covering standard pipes dually stenciled as line pipes. The first sentence of the Order states that it covers "certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches, of any wall thickness." J.A. 40763. There is no dispute that Saha's dual-stenciled pipes are "circular welded carbon steel pipes and tubes from Thailand" and that they meet the physical dimensions the Order describes. *E.g.*, Appellee Br. 16-17.

In the following sentence, the Order adds that the products covered by the Order are "commonly referred to in the industry as 'standard pipe[s].'" J.A. 40763. By this limitation, the Order further explicitly refines the universe of merchandise defined by the as-described physical characteristics, limiting it to "standard pipe[s]." Recognizing the effect of [**32] this limitation, Commerce determined that, pipes singularly certified as line pipes (not as standard pipes), even if they meet the described dimensions, fell outside of the scope of the Order. J.A. 40773-75.

The same conclusion does not, as Saha contends, extend to dual-stenciled pipes. *See, e.g.*, Appellee Br. 20 (Saha interpreting the "commonly referred to in the industry as 'standard pipe[s]'" language as further excluding standard pipes dual-stenciled as line pipes). There is no dispute that dual-stenciled pipes are certified as "standard pipe[s]," suitable for standard-pipe applications and in compliance with ASTM specifications. *E.g., id.* at 4, 16-17, 19. There is also no dispute that these pipes additionally meet the API specification for, and are dually stenciled as, line pipes. *Id.* at 11. But meeting an additional specification, namely API line pipe specification(s), does not strip away the qualification of these pipes as standard pipes. J.A. 40775; *see* J.A. 40765 (diagram illustrating pipes meeting overlapping industry standards). "[S]tandard pipe[s]," as recited in the Order, means what it plainly says, "standard pipe[s]." It cannot be reasonably read to mean, as Saha contends, [**33] an unidentified subset within standard pipes that remains after another unidentified subset is excluded. *E.g.*, Appellee Br. 20 (Saha asserting that the Order excludes standard pipes that are dually stenciled, leaving within the scope only those that are singularly stenciled as standard pipes).

The last part of the Order provides a listing of tariff codes under which the subject merchandise is classifiable. Saha contends that because the listing does not include those tariff codes under which dual-stenciled pipes would be imported, it shows that the

Order does not cover dual-stenciled pipes. *Id.* at 18-19. We disagree.

Immediately following the listing of tariff codes, the concluding sentence of the Order explicitly instructs that the tariff codes are "provided for convenience and purposes" of the CBP, and that "the written description of the merchandise subject to the order is dispositive." J.A. 40763. As we noted above, antidumping duty orders listing tariff treatment for CBP purposes often contain the same instructions. The regulations do not require Commerce to [*1328] provide an exhaustive and dispositive listing of all tariff codes covering the entirety of merchandise subject to an antidumping [**34] duty order. *Novosteel SA v. United States*, 284 F.3d 1261, 1270-71 (Fed. Cir. 2002). The listed tariff codes are thus what the Order instructs them to be, "for convenience and purposes" of the CBP. J.A. 40763. They cannot be reasonably read to exclude a subset of standard pipes, contradicting the "written description" that the Order instructs to be "dispositive." *Id.*

Accordingly, Commerce's determination in its *Scope Ruling* reasonably read the scope language to cover standard pipes that are dually stenciled as line pipes. The Thailand Order does not contain any exclusionary language, and we find Saha's attempt to read in an exclusion unsupported and unreasonable.

B. The (k)(1) Materials Support Commerce's Interpretation

Saha alternatively argues that the scope language itself does not resolve whether the Order covers dual-stenciled pipes and that the (k)(1) materials support excluding dual-stenciled pipes from the Order. Appellee Br. 24. We disagree. Consideration of the (k)(1) materials supports Commerce's *Scope Ruling* determination and not Saha's proposed exclusion.

As noted *supra*, Saha does not dispute that dual-stenciled pipes are certified as standard pipes, meet ASTM specifications for standard pipes, and suit the corresponding standard-pipe applications. The sole remaining [**35] dispute thus boils down to, absent an express exclusion in the scope language in the Thailand Order, whether the (k)(1) materials support an implicit exclusion of standard pipes if they are dually stenciled as line pipes. They do not.

There is a long history of antidumping proceedings involving imports of steel pipes from various countries going back to the early 1980s. *See Fourth Sunset Review* at I-4. As Commerce explained, in the industry, steel pipes are broadly classified based on end-use, and they are "generally produced according to" and "distinguishable based on" industry standards and specifications. J.A. 40773; *see also Final Injury Determination* at I-1 n.1 (referring to steel pipes descriptions set forth in *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea,*

Determination of the Commission, Inv. No. 701-TA-168, USITC Pub. 1345 (Feb. 1983) (Final)). Throughout the initial investigation culminating in the Thailand Order, the same industry specifications and designations were consistently used to define standard pipes, with no qualifiers based on additional specifications the same pipes might also meet.

In the initial February 1985 petition, the petitioners described "standard pipe" as a "general-purpose commodity . . . commonly referred to in the industry as a standard pipe" and "generally produced to ASTM [**36] specifications."[18] J.A. 40536. Line pipes, which the petitioners originally included in the petition but later withdrew, were described as "produced to API specifications for line pipe[s]." *Id.*

When Commerce initiated the antidumping duty investigation in March 1985, Commerce described the pipes under investigation as "*commonly referred to in the industry as standard pipe* or structural tubing, [] produced to various ASTM specifications." *Commerce Initiation Notice*, 50 Fed. Reg. at 12068-12069 [*1329] (emphasis added). In its injury investigation and like-product determination, the ITC adopted the same description in defining standard pipes subject to its investigation, describing that "[t]he

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[18] The particular ASTM or API specifications referenced in the historical documents are not in dispute in this case. *E.g.*, J.A. 40764 (noting that standard pipes are commonly produced to "ASTM specifications A-120, A-53, and A-135," and line pipes to "API specification 5L").

imported pipe and tube products that are the subject of these investigations are . . . *known in the industry as standard pipes* and tubes. . . . *They are most commonly produced to ASTM specifications*." *Final Injury Determination* at I-1-I-2 (emphasis added); *Preliminary Injury Determination* at A-6.

None of the historical documents contains any qualifier restricting the definition of standard pipes or carves out any subset of standard pipes based on additional specifications they may meet. As long as the pipes meet ASTM specifications, they are considered standard [**37] pipes.[19] The historical context of the initial antidumping duty investigation therefore supports Commerce's interpretation of the scope of "standard pipe[s]" under the Order. Because dual-stenciled pipes meet ASTM specifications for

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[19] The current scope language incorporates the phrase "commonly referred to in the industry as standard pipe," tracking the subject-merchandise description Commerce used when it initiated the initial investigation. *Compare* J.A. 40763, *with Commerce Initiation Notice*, 50 Fed. Reg. at 12069. Similarly, in the originally issued March 1986 Order, Commerce used the phrase "known as" standard pipes, tracking the description Commerce used in *the Final LTFV Determination* and the ITC's description in its *Final Injury Determination*. *Compare* ***51 Fed. Reg. at 8341***, *with Final LTFV Determination*, 51 Fed. Reg. at 3384 *and Final Injury Determination* at I-1-I-2. The historical context clarifies that these phrases describe pipes "produced to [various] ASTM specifications" and contain no limitation based on other criteria. *See, e.g., Commerce Initiation Notice*, 50 Fed. Reg. at 12068-12069; *Final Injury Determination* at I-1-I-2.

standard pipes, they constitute “standard pipe[s]” and fall within the Thailand Order’s scope.

The (k)(1) materials do not support Saha’s proposed clarification of the Order to exclude dual-stenciled pipes from the scope. Saha primarily relies on (1) its proposed interpretation of the petitioners’ intention behind their partial withdrawal concerning line pipes during the initial investigation; and (2) the exclusions in other trade remedy proceedings, as referenced in the ITC’s sunset reviews. Appellee Br. 11-13. Neither is persuasive. At bottom, Saha would have us inject an implicit exclusion into the scope language based on a supposed implicit inclusion that Saha reads from certain (k)(1) materials. That is backwards and ignores the paramount weight the scope language carries that the (k)(1) materials do not. E.g., [**38] *Duferco Steel*, 296 F.3d at 1097. While the (k)(1) materials may aid in clarifying the scope of an order, they cannot rewrite or change the scope of the order, and they do not here. *Id*.

During the initial investigation, in March 1985, the petitioners partially withdrew their petition “insofar as they concern line pipe[s], TSUS numbers 610.3208 and 3209.” J.A. 40612. Saha now interprets this statement to indicate that the petitioners intended to broadly exclude all pipes that “meet[] the API definition of line pipe[s],” regardless of whether they meet the specifications of other pipes. Appellee Br. 26. According to Saha, at the time of the initial investigation, dual-stenciled pipes would have

entered under "TSUS numbers 610.3208 and 3209." *Id.* at 28. Based on these propositions, Saha claims that the petitioners had intended to exclude dual-stenciled pipes from the initial investigation and the resulting Thailand Order. *Id.* We disagree.

It is Commerce, "not those who initiated the proceedings," that "determine[s] the scope of the final orders." *Duferco Steel*, 296 F.3d at 1097. As discussed above, while limiting the initial investigation to [*1330] standard pipes, Commerce incorporated no restriction excluding standard pipes dually stenciled as line pipes. [**39] Further, as Commerce explained, in contrast to some later CWP investigations where the petitioners specifically excluded dual-stenciled pipes, the petitioners "made no similar statement or clarification" during the initial investigation underlying the Thailand Order. J.A. 40778. Here, the petitioners' partial-withdrawal statement made no reference to, let alone excluded, dual-stenciled pipes. J.A. 40612. We find no support in the petitioners' statement, or Saha's interpretation of the petitioners' statement, that Commerce excluded dual-stenciled pipes from the initial investigation or the scope of "standard pipe[s]" in the resulting Order.

For similar reasons, we reject Saha's attempt to extrapolate its interpretation of the petitioners' withdrawal of line pipes to how the ITC supposedly limited the merchandise underlying its injury investigation in 1985-86. *See* Appellee Br. 35-36. As explained above, in its injury investigation and the

resulting affirmative determination, the ITC described the product under its investigation and causing injury as "standard pipes" produced to ASTM specifications. *Final Injury Determination* at I-1; *Preliminary Injury Determination* at 5, 7; J.A. 62 (Commerce [**40] explaining that the ITC "expressly found ASTM stenciled pipe (standard pipe) from Thailand injur[ed] the domestic industry"). The ITC did not reference or somehow carve out any subset of "standard pipes," based on other specification(s) these pipes might have simultaneously met. Nor did the ITC do so in defining "like product" or the domestic standard pipe industry that it determined to be injured by the imported standard pipes. *See Final Injury Determination* at 6-7; *Preliminary Injury Determination* at 6-9.

Saha's reliance on other investigations and CWP orders, as referenced in the ITC's sunset reviews, is similarly unavailing. As Commerce explained, the sunset reviews summarize the ITC's assessment of various CWP orders resulting from separate investigations. J.A. 40776-77; J.A. 64-65; *Fourth Sunset Review* at 6 (noting CWP orders under review "vary in terms of outside wall thickness specifications and product exclusions"). The various orders under the same sunset review have different scope terms: some explicitly exclude dual-stenciled or triple-stenciled pipes, which the Thailand Order does not do. For instance, the 1992 CWP orders concerning imports from Brazil, Korea, Mexico, and [**41] Venezuela state that "Standard pipe that

is *dual or triple certified/stenciled* that enters the U.S. as line pipe of a kind used for oil or gas pipelines is [] *not included in these orders*."[20] *Notice of Antidumping Orders: 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, 49453 (Nov. 2, 1992) (emphasis added). The Thailand Order, in contrast, does not contain similar exclusionary language, which Commerce properly gave effect in interpreting the Thailand Order. We reject Saha's attempt to read references to exclusions in other CWP orders as equally applying to the Thailand Order.

Saha's reliance on President Clinton's temporary safeguard duties imposed on line pipes fails for similar reasons. *See* [*1331] Appellee Br. 43. The safeguard duties imposed by President Clinton represent a different trade remedy addressing *line pipes*, which came into effect in 2000 and expired in 2003.[21] It bears little relevance to, and little weight to control, how Commerce defined the scope of *standard pipes* in the

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[20] Saha's reliance on the *Wheatland* decision similarly fails. Appellee Br. 47 (citing *Wheatland*, 161 F.3d at 1366). In *Wheatland*, we addressed the same 1992 CWP orders and concluded that the scope language explicitly excluded dual-certified pipe. *Wheatland*, 161 F.3d at 1368-69. The same exclusion cannot be found in the Thailand Order.

[21] Proclamation No. 7274, 65 Fed. Reg. at 9193-9194; see also 19 U.S.C. §§ 2251, 2253.

1986 Thailand Order or in the initial investigation leading up to it.

Accordingly, we conclude that the (k)(1) materials support Commerce's reasonable interpretation of the scope of standard pipes in the Thailand Order, and that Saha's proposed exclusion lacks support. The Court of International Trade [**42] reached a contrary conclusion that lacked support in the record and failed to give sufficient deference to Commerce under the substantial evidence standard of review and in matters "particularly within [Commerce's] expertise." *King Supply*, 674 F.3d at 1348. Even if two inconsistent yet reasonable conclusions could have been drawn from the record, the Court of International Trade cannot substitute its own judgment for that of Commerce. *Id.* at 1348, 1351; *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). Here we find one reasonable conclusion, Commerce's.

Conclusion

We have considered Saha's remaining arguments and find them unpersuasive. There is no basis to exclude products covered by the plain text of the Order, notwithstanding that the same products have been given a different name or met additional specifications. *Mid Continent*, 725 F.3d at 1301 ("[M]erchandise facially covered by an order may not be excluded from the scope of the order unless the order can reasonably be interpreted so as to exclude

it."). To conclude otherwise would allow foreign producers and exporters to circumvent antidumping duty orders by simply stamping their products with an additional mark. That would take the teeth out of antidumping duty orders, depriving the domestic industry of the very relief from harm posed by unfairly traded [**43] imports that is contemplated by the U.S. trade statutes. We reject such an approach.

For the foregoing reasons, we hold that Commerce's *Scope Ruling* that imports of dual-stenciled pipes fall within the scope of the Thailand Order is reasonable and supported by substantial evidence. We reverse the Court of International Trade's interpretation and judgment to the contrary.

REVERSED

Costs

Costs against Appellee.

Dissent by: CHEN

Dissent

CHEN, *Circuit Judge*, dissenting.

A 1986 antidumping order on pipes imported from Thailand covers "certain circular welded carbon steel pipes and tubes . . . , which are commonly referred to in the industry as 'standard pipe' or 'structural tubing.'" *Antidumping Duty Order on Circular Welded*

Carbon Steel Pipes & Tubes from Thailand: Final Scope Ruling on Line Pipe & Dual-Stenciled Standard & Line Pipe, No. A-549-502 (June 30, 2020) (Final), J.A. 40763 (Scope Ruling I); Antidumping Duty Order: Circular Welded Carbon Steel Pipes & Tubes from Thailand, 51 Fed. Reg. 8341, 8341 (Mar. 11, 1986) (*Thailand Order*). This appeal raises the question of whether the *Thailand Order* encompasses dual-stenciled pipes and, in particular, whether "dual-stenciled pipe" is *also* "commonly referred to in the industry as 'standard pipe."' *Scope Ruling I*, J.A. 40763. In my view, it is far from clear from the face of the *Thailand Order* whether people in the relevant industry [*1332] refer to dual-stenciled pipe as standard pipe.

The record reflects the existence of three types of circular welded carbon steel pipes that are referred to as standard pipes, line pipes, and dual-stenciled [**44] pipes. Standard pipes typically satisfy American Society for Testing & Materials (ASTM) specifications A-53, A-120, or A-135, while line pipes typically satisfy the requirements of American Petroleum Institute (API) specifications API-5L or API-5X. *Certain Welded Carbon Steel Pipes & Tubes from Turkey & Thailand*, Inv. Nos. 701-TA-253, 731-TA-252, USITC Pub. 1810, at I-2 (Feb. 1986) (Final) (*Final Injury Determination*); *Scope Ruling I*, J.A. 40764. Compared to standard pipes, line pipes are made from higher grade steel, require additional testing to ensure they satisfy API specifications, and may contain a higher content of carbon and

manganese. *Final Injury Determination* at II-1. To ensure compliance with ASTM and API specifications, respectively, standard pipes and line pipes are "inspected and tested at various stages in the production process." *Id.* at I-2, II-1. Dual-stenciled pipes—the products central to this dispute—are "stamped to indicate compliance with" both ASTM and API specifications. *Certain Circular Welded Pipe & Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532 to - 534, -536, USITC Pub. 4754, at 6 (Jan. 2018) [**45] (*Fourth Sunset Review*).

The Department of Commerce (Commerce) and the Court of International Trade (Trade Court) vigorously contest how to answer the question of whether the *Thailand Order* covers such dual-stenciled pipes, with Commerce insisting that the *Thailand Order*'s reference to "standard pipe" covers dual-stenciled pipes, and the Trade Court maintaining the opposite. *Scope Ruling I*, J.A. 40775-78; *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 547 F. Supp. 3d 1278, 1291-92, SLIP OP. 2021-135 (Ct. Int'l Trade 2021) (*Saha I*); *Antidumping Duty Order on Circular Welded Carbon Steel Pipes*, No. A-549-502 (Jan. 6, 2022) (Final), J.A. 58-65 (*Scope Ruling II*); *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 592 F. Supp. 3d 1299, 1305, SLIP OP. 2022-99 (Ct. Int'l Trade 2022) (*Saha II*). I agree with the Trade Court's position and thus would have affirmed its decisions in both *Saha I* and *Saha II*.

The plain language of the *Thailand Order* is unclear as to whether the relevant industry commonly refers to dual-stenciled pipes as standard pipes. That is, does dual-stenciled pipe go by two different names or just one? That ambiguity requires us to consider the interpretative materials under 19 C.F.R. § 351.225(k)(1) (2020), i.e., the (k)(1) materials. These (k)(1) materials contain substantial evidence supporting only the conclusion that the *Thailand Order* does not cover dual-stenciled pipes. For example, among numerous other pieces of evidence from the (k)(1) materials that support the Trade Court's conclusion that the *Thailand Order* excludes dual-stenciled pipes, the International Trade [**46] Commission's (ITC) reviews of antidumping orders for circular welded pipes—including the *Thailand Order*—indicated that the *Thailand Order* does not cover dual-stenciled pipes, expressly stating that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, *is not within the scope of the orders*." *Certain Circular Welded Pipe & Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532 to - 534, -536, USITC Pub. 4333, at 8 (June 2012) (*Third Sunset Review*) (emphasis added); *see Fourth Sunset Review* at 6-7. I, therefore, respectfully dissent.

[*1333] **I. The Plain Language Of The *THAILAND ORDER*'S SCOPE**

"[T]he question of whether the unambiguous terms of [an antidumping order] control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo." *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020) (first alteration in original) (quoting *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017)). "[W]e consider ambiguity in the context of the merchandise at issue in this case." *Id.* at 1364 (citing 19 C.F.R. § 351.225(a)).

The *Thailand Order* requires the covered merchandise to be "commonly referred to in the industry as 'standard pipe' or 'structural tubing'"—the "commonly referred to" requirement. [**47] *Scope Ruling I*, J.A. 40763. The appellant Wheatland Tube Company, Commerce, and the majority simply assume this requirement covers any pipe having the same certification as "standard pipe." Appellant's Opening Br. 21-22; *Scope Ruling I*, J.A. 40775; Maj. Op. 28; *see also* Oral Arg. 3:22-3:35 (available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-2181_11072023.mp3). But neither the "commonly referred to" requirement nor any part of the *Thailand Order* speaks directly to the certifications of the covered merchandise; instead, the *Thailand Order* simply mandates that the pipes are "commonly referred to in the industry as 'standard pipe.'" *Scope Ruling I*, J.A. 40763. Although I agree

with the majority that one reasonable view is that this requirement encompasses any pipe *certified* as standard pipe, including dual-stenciled pipes, Maj. Op. 28, I believe an equally reasonable view is that this requirement encompasses only pipes *commonly called* "standard pipe" and that dual-stenciled pipes commonly go by a different naming convention: "dual-stenciled pipe." Moreover, it seems at least reasonably plausible that "standard pipe" would be a confusing misnomer for dual-stenciled pipe that provides an incomplete and misleading [**48] understanding of the nature of dual-stenciled pipe. I accordingly would have held that the *Thailand Order* is ambiguous as to whether dual-stenciled pipes are covered.

The majority says little as to the order's "commonly referred to" requirement, asserting that "meeting an additional specification, namely API line pipe specification(s), does not strip away the qualification of [dual-stenciled] pipes as standard pipes." Maj. Op. 28. It is true, as the majority notes, that the *Thailand Order* does not contain any language expressly excluding dual-stenciled pipes. *Id.* at 29. But this is not dispositive. *Cf. Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) ("Commerce cannot find authority in an order based on the theory that the order does not deny authority."). Though the *Thailand Order* does not expressly exclude dual-stenciled pipes, the "commonly referred to" requirement nonetheless is open to interpretation as to what types of pipes may be included. *Cf. Mid Continent Nail Corp. v. United States*, 725 F.3d 1295,

1301 (Fed. Cir. 2013) ("[O]rders cannot be extended to *include* merchandise that is not within the scope of the order as reasonably interpreted . . . ."); *Duferco Steel*, 296 F.3d at 1095-96 (explaining that an order, which did not expressly exclude certain merchandise, could not "reasonably be interpreted to include" that merchandise).

The [**49] majority's interpretation of the *Thailand Order* disregards dual-stenciled pipes' additional certification to API specifications. Because this additional certification could change how the industry commonly refers to such pipes, I do not believe we can determine, as a matter of law, whether this interpretation is unreasonable [*1334] from merely looking at the plain language of the *Thailand Order*. *Meridian Prods.*, 851 F.3d at 1381-82 (describing that while "we grant Commerce 'substantial deference' with regard to its interpretation of its own antidumping duty and countervailing duty orders," this deferential review is tempered by the fact that "the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo"). In the present case, Commerce could have characterized the covered pipes in terms of certifications, but, for whatever reason, it did not. The *Thailand Order* instead requires an inquiry into what "standard pipe" refers to in industry circles.

The tariff numbers listed in the *Thailand Order* call further attention to the ambiguity in its plain

language. *See Scope Ruling I*, J.A. 40763. According to the majority, these tariff numbers [**50] cannot reasonably be read to exclude dual-stenciled pipes. Maj. Op. 29. This is because, the majority explains, the *Thailand Order* specifies that the "written description of the merchandise subject to the order is dispositive." *Id.* (quoting *Scope Ruling I*, J.A. 40763). Although I agree with the majority that these tariff numbers cannot override any dispositive written description elsewhere in the order, the *Thailand Order*, in my view, does not preclude the list of tariff numbers from being probative of whether the written description is ambiguous and of whether the "commonly referred to" requirement encompasses dual-stenciled pipes. *See Mid Continent Nail*, 725 F.3d at 1298, 1305 (permitting Commerce to interpret an antidumping order in light of the listed tariff numbers, notwithstanding the order expressly stating "[w]hile the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of [the order] is dispositive" (alterations in original) (quoting *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44961, 44961-62 (Aug. 1, 2008))). The listed tariff numbers do not cover dual-stenciled pipes, and this list does not include the numbers under which dual-stenciled pipes would have been imported at the time the *Thailand Order* was issued. *Saha I*, 547 F. Supp. 3d at 1293. These tariff numbers further signify [**51] that the

written description is unclear as to whether the *Thailand Order* encompasses dual-stenciled pipes.

Certification and name are two different concepts. An additional certification can change the name we call something.[1] The majority's perspective is that the "commonly referred to" requirement of the *Thailand Order* can only be reasonably understood to encompass dual-stenciled pipes in spite of the fact that dual-stenciled pipes possess API certifications that standard pipes do not have. But an equally reasonable perspective is that this requirement excludes dual-stenciled pipes because the industry does not commonly refer to dual-stenciled pipes as standard pipe in view of the additional API certifications of dual-stenciled pipes. The majority regards such a possibility as "unreasonable." Maj. Op. 29. I disagree and thus would have held that the *Thailand Order* is ambiguous as to whether it covers dual-stenciled pipes. *Meridian Prods.*, 851 F.3d at 1381 n.7 ("The relevant scope terms are 'unambiguous' if they have 'a single clearly defined or stated meaning.'" (quoting *Unambiguous*, [*1335] Webster's Third New International Dictionary of the English Language

[1] In an example relevant to the jurisdiction of this court, those who have completed the registration requirements of the U.S. Patent and Trademark Office (PTO) may be called "patent agents." When patent agents also complete the requirements of a state bar, they may be called "patent attorneys." But even though patent attorneys have completed the PTO registration requirements, patent attorneys are generally not called patent agents.

Unabridged (1986))). We therefore must consult the (k)(1) materials [**52] to determine whether the *Thailand Order* excludes or includes dual-stenciled pipes.

II. THE (K)(1) MATERIALS

If the language of an antidumping order is ambiguous, Commerce turns to the regulatory history of the order, i.e., the (k)(1) materials, including the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of Commerce and the ITC. 19 C.F.R. § 351.225(k)(1)(i); *Mid Continent Nail*, 725 F.3d at 1302. Commerce's analysis of the (k)(1) materials "produces 'factual findings reviewed for substantial evidence.'" *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 799 (Fed. Cir. 2020) (quoting *Meridian Prods.*, 851 F.3d at 1382). Here, substantial evidence does not support Commerce's determination in *Scope Ruling I* that the *Thailand Order* covers dual-stenciled pipes and instead supports only Commerce's determination in *Scope Ruling II* that the *Thailand Order* does not cover dual-stenciled pipes.

A.

Commerce in *Scope Ruling I* failed to offer any evidence from the (k)(1) materials affirmatively supporting a finding of inclusion. Commerce at best attacked the evidence proffered by the plaintiff Saha Thai Steel Pipe Public Company Ltd. (Saha) in

support of a finding of exclusion. *See* J.A. 40776-78. But despite adducing no affirmative evidence supporting inclusion, Commerce found the *Thailand Order* encompassed dual-stenciled pipes. *Id. [**53]* at 40778.

The majority adopts the same erroneous line of reasoning, rebuffing each piece of evidence Saha and the Trade Court offered in support of a finding of exclusion but then failing to counter with any evidence in support of inclusion, short of a stray reference in the ITC's reviews of antidumping orders on circular welded pipes—discussed in greater detail below—that acknowledged the reviewed orders had varying express exclusions. *See* Maj. Op. 29-35. In doing so, the majority also overlooks clear evidence to the contrary in which the ITC unequivocally indicated that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders." *Third Sunset Review* at 8; *see Fourth Sunset Review* at 6-7. Despite the dearth of evidence in support of inclusion, the majority concludes "that the (k)(1) materials support Commerce's reasonable interpretation . . . and that Saha's proposed exclusion lacks support." Maj. Op. 35. This conclusion seems rooted in the majority's earlier determination that the "commonly referred to" requirement unambiguously covers dual-stenciled pipe. *See id.* at 31-32 ("The [(k)(1) materials] [**54] therefore support[] Commerce's interpretation of the scope of 'standard pipe[s]' in the [*Thailand Order*]." (third alteration in

original) (quoting *Scope Ruling I*, J.A. 40763)). But as discussed above, I believe the plain language of the *Thailand Order* is ambiguous. Because nothing in the (k)(1) materials appears to affirmatively suggest the *Thailand Order* includes dual-stenciled pipes, I agree with the Trade Court's assessment that nothing in the (k)(1) materials supports Commerce's determination in *Scope Ruling I* that the *Thailand Order* covers dual-stenciled pipes. *Saha I*, 547 F. Supp. 3d at 1299 ("[T]he absence of evidence is indeed evidence of absence. Substantial evidence does not support the Commerce Department's scope determination.").

B.

The (k)(1) materials in fact provide numerous examples affirmatively supporting [*1336] a finding that the *Thailand Order* excludes dual-stenciled pipes. To start, the initial investigation and injury determination for the *Thailand Order* provide substantial evidence backing a finding of exclusion. The majority contends that "the petitioners' partial-withdrawal statement [before Commerce issued the *Thailand Order*] made no reference to, let alone excluded, dual-stenciled pipes." Maj. Op. 33. I disagree with the [**55] majority's reading of these materials and, in fact, believe these materials affirmatively suggest the *Thailand Order* excludes dual-stenciled pipe imported as line pipe.

First, the petitioners' withdrawal of tariff codes under which dual-stenciled pipes were imported at the time

of the final order—namely, Tariff Schedules of the United States (TSUS) (the precursor to the HTSUS) numbers 610.3208 and 610.3209—suggests that Commerce's deletion of these same tariff codes in the final antidumping order was deliberate. *Saha I*, 547 F. Supp. 3d at 1295. As the Trade Court recounted, the initial petition underlying the *Thailand Order* requested investigation of pipes imported under various TSUS numbers, including 610.3208 and 610.3209. *Id.* The petitioners subsequently withdrew their "petitions insofar as they concern[ed] line pipe, TSUS numbers 610.3208 and 3209." *Id.* (quoting J.A. 40612). As a result, the ITC exclusively evaluated injury resulting from standard pipe and did not evaluate injury from any pipes importable under the withdrawn tariff numbers—including both line pipe and dual-stenciled pipe imported as line pipe. *Id.* This backdrop indicates that Commerce intentionally omitted the tariff codes associated with dual-stenciled pipes in its final antidumping [**56] order, thereby supporting a finding that the *Thailand Order* excludes dual-stenciled pipes. *Id.*

Second, as evidenced by their subsequent investigations, Commerce and the ITC understood the difference between the given name for a pipe and the certifications associated with that pipe. Commerce described its investigation scope by stating that "[t]hese products, commonly referred to in the industry as standard pipe or structural tubing, are produced to various ASTM specifications, most notably A-152, A-53 or A-135," and the ITC described

its investigation scope in a similar manner. *Certain Circular Welded Carbon Steel Pipes & Tubes from Thailand; Initiation of Antidumping Duty Investigation*, 50 Fed. Reg. 12068, 12069 (Mar. 27, 1985); *Final Injury Determination* at I-1 to I-2. Put differently, these scope descriptions referred to both a name of a pipe ("standard pipe") and ASTM specifications ("A-152," "A-53," "A-135"). Yet, Commerce's final antidumping order did not refer to the ASTM specifications, instead mentioning only the name of the covered pipe, i.e., "standard pipe." This omission suggests Commerce knew how to define the scope of the *Thailand Order* in terms of certifications to the ASTM specifications but declined to do so. The majority nevertheless interprets the "commonly referred to" requirement in the *Thailand Order* as defining [**57] the certifications of the covered merchandise. This interpretation is contrary to the evidence from Commerce's and the ITC's investigations leading up to the final antidumping order.

For these reasons, as the Trade Court found, the (k)(1) materials for the initial investigation and the injury determination support the conclusion that the *Thailand Order* excludes dual-stenciled pipe imported as line pipe.

C.

The ITC's four subsequent sunset reviews of the Thailand Order—which no party disputes are (k)(1)

materials—support a finding of exclusion. See generally [*1337] Certain Pipe & Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey & Venezuela, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -276, -277, -296, -409, -410, -532 to - 534, -536, -537, USITC Pub. 3316 (July 2000) (First Sunset Review); Certain Pipe & Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -409, -410, -532 to - 534, -536, USITC Pub. 3867 (July 2006) (Second Sunset Review); Third Sunset Review; Fourth Sunset Review.

The *First Sunset Review* and *Second Sunset Review* reflect the ITC's understanding that [**58] standard pipes are distinct from dual-stenciled pipes. For example, in measuring the discernible adverse impact of potential revocation of the antidumping order for Mexican imports, the *Second Sunset Review* rejected the argument that multiple-stenciled line pipe that "satisfie[d] ASTM specifications for [circular welded pipe]" would affect the same industry as a "product that satisfie[d] ASTM specifications but not API specifications." *Second Sunset Review* at 13 n.66. According to the ITC, "multiple-stenciled line pipe requires [more] steel than [circular welded pipe] to meet [API] specifications applicable to line pipe. At current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications." *Id.* As the

Trade Court explained, this discussion demonstrates that the ITC recognized that dual-stenciled pipes and pipes singularly certified to ASTM specifications (i.e., standard pipes) affected different industries and thus considered dual-stenciled pipes to be distinct from standard pipes. *See Saha I*, 547 F. Supp. 3d at 1297.

Moreover, the *First Sunset Review* and the *Second Sunset Review* acknowledged [**59] that President Clinton's safeguard duties—imposed on imports of line pipes from certain countries—encompassed dual-stenciled pipes even though President Clinton's proclamation initiating these duties expressly mentioned only line pipe, not dual-stenciled pipe. *See First Sunset Review* at 28; *Second Sunset Review* at OVERVIEW-5 n.16; *Proclamation 7274: To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, 65 Fed. Reg. 9193, 9193-94 (Feb. 18, 2000). While I agree with the majority that the safeguard duties "represent a different trade remedy addressing *line pipes*," Maj. Op. 35, the ITC's acknowledgement that these duties covered dual-stenciled pipes, notwithstanding the absence of express language in the proclamation, reflects the ITC's understanding that dual-stenciled pipes are closer in kind to line pipes than to standard pipes.

The *Third Sunset Review* and the *Fourth Sunset Review* further confirm that the ITC regarded dual-stenciled pipes to be distinct from standard pipes. The *Third Sunset Review*—in defining the scope of the

orders under review—explicitly described that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders." *Third Sunset Review* at 8. The *Fourth Sunset Review* described the scope of the [**60] orders under review in a nearly identical manner. *Fourth Sunset Review* at 6-7. As the Trade Court determined, "[b]oth statements are unqualified and give no indication that the scope language does not apply to the Thailand Order." *Saha I*, 547 F. Supp. 3d at 1298.

The majority fails to engage with these statements, instead placing outsized weight on express exclusions that appear in other antidumping orders covered in the sunset reviews but that do not appear in [*1338] the *Thailand Order*. Maj. Op. 34-35. For instance, as the majority observes, anti-dumping orders for Brazil, Korea, Mexico, and Venezuela expressly excluded dual-stenciled pipes, stating that "[s]tandard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in these orders." *Id.* at 34 (emphases omitted) (quoting *Notice of Antidumping Orders: Certain Circular Welded Non—Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico & Venezuela*, 57 Fed. Reg. 49453, 49453 (Nov. 2, 1992)). But in addition to expressly excluding dual-stenciled pipes, these orders expressly excluded "line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished

conduit." *Notice of Antidumping Orders*, 57 Fed. Reg. at 49453. These other orders, as the majority seems to acknowledge, at best confirm that the *Thailand Order* and these other [**61] orders do not contain the same express exclusions.[2] Maj. Op. 34-35. I fail to see, however, how these express exclusions preclude the *Thailand Order* from being interpreted to exclude dual-stenciled pipes, particularly in view of the ITC's direct statements in the *Third Sunset Review* and *Fourth Sunset Review* averring that the covered orders exclude dual-stenciled pipes.

For these reasons, I agree with the Trade Court that the ITC's sunset reviews further support a finding that the *Thailand Order* excludes dual-stenciled pipes.

D.

In view of the foregoing, I would have found that the (k)(1) materials do not provide substantial evidence supporting Commerce's view in *Scope Ruling I* that

[2] To the extent the majority argues that the express exclusion of dual-stenciled pipes in these other orders affirmatively establish that the Thailand Order covers dual-stenciled pipes because the other orders expressly exclude dual-stenciled pipes while the Thailand Order contains no express exclusions, such an argument would be logically inconsistent with the undisputed understanding that the Thailand Order excludes line pipes. These other orders contain express exclusions of line pipes while the Thailand Order does not, but no one contends that the Thailand Order would accordingly include line pipes. Oral Arg. 23:20-23:27.

the *Thailand Order* includes dual-stenciled pipes. Furthermore, I would have found that the (k)(1) materials provide substantial evidence supporting Commerce's determination under protest in *Scope Ruling II* that the *Thailand Order* excludes dual-stenciled pipes.

Conclusion

Accordingly, I would have affirmed the Trade Court's decisions in both Saha I and Saha II. I respectfully dissent.

APPENDIX B

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 22-2181

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED,
PLAINTIFF-APPELLEE

v.

UNITED STATES,
DEFENDANT

WHEATLAND TUBE COMPANY,
DEFENDANT-APPELLANT

Appeal from the United States Court of International Trade in No. 1:20-cv-00133-SAV, Judge Stephen A. Vaden.

ON MOTION

Before LOURIE, REYNA, and CHEN, *Circuit Judges*.[1]

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[1] Circuit Judge Newman did not participate.

PER CURIAM.

O R D E R

Saha Thai Steel Pipe Public Company Limited moves for leave to file an entry of appearance for Katherine Afzal and Ana M. Amador Gil and moves for leave to file a petition for rehearing out of time and appends a combined petition for panel rehearing and rehearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion for leave to appear is granted. The entry of appearance is accepted.

(2) The motion for leave to file a petition for rehearing out of time is granted. The combined petition for panel rehearing and rehearing en banc is accepted as filed and will be considered in due course.

FOR THE COURT

[SEAL]

/s/ Jarrett B. Perlow

June 21, 2024
Date

Jarrett B. Perlow

Clerk of the Court

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 22-2181

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED,
PLAINTIFF-APPELLEE

v.

UNITED STATES,
DEFENDANT

WHEATLAND TUBE COMPANY,
DEFENDANT-APPELLANT

Appeal from the United States Court of International Trade in No. 1:20-cv-00133-SAV, Judge Stephen A. Vaden.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL,

CUNNINGHAM, and STARK, *Circuit Judges*.[2]

PER CURIAM.

O R D E R

Saha Thai Steel Pipe Public Company Limited filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue July 31, 2024.

FOR THE COURT

[SEAL]

/s/ Jarrett B. Perlow

July 24, 2024
Date

Jarrett B. Perlow
Clerk of the Court

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[2] Circuit Judge Newman did not participate.

APPENDIX D

UNITED STATES COURT OF
INTERNATIONAL TRADE

SAHA THAI STEEL PIPE PUB. CO.
V. UNITED STATES

August 25, 2022, Decided

Court No. 1:20-cv-00133

Reporter

592 F. Supp. 3d 1299 *; 2022 Ct. Intl. Trade LEXIS 99 **; SLIP OP. 2022-99; 2022 WL 3681263

SAHA THAI STEEL PIPE PUBLIC COMPANY, LTD., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Subsequent History: Reversed by *Saha Thai Steel Pipe Pub. Co. v. United States*, 2024 U.S. App. LEXIS 11726 (Fed. Cir., May 15, 2024)

Prior History: *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 11 Ct. Int'l Trade 257, 1987 Ct. Intl. Trade LEXIS 43, SLIP OP. 87-43 (Apr. 2, 1987)

Disposition: Sustaining Commerce's remand redetermination results.

Case Summary

Overview

HOLDINGS: [1]- The U.S. Department of Commerce's remand results properly found that dual-stenciled line pipe was not covered within the scope of an antidumping duty order because the record before Commerce, from a company's decision to withdraw line pipe from consideration in the original investigation to the most recent International Trade Commission (ITC) sunset review, supported that determination. No line pipe was manufactured in Thailand when Commerce undertook its initial investigation almost forty years ago, and the ITC's report made no harm finding for line or dual-stenciled pipe from Thailand; [2]- Because an importer repeatedly referenced all four sunset reviews and because the reviews cross-referenced each other, all four reviews were sufficiently intertwined with the relevant inquiry, and Commerce could not choose ignore them.

Outcome

Commerce's remand redetermination results sustained.

Counsel: [**1] Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiff. With him on the brief was James C. Beaty.

Claudia Burke and In K. Cho, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With them on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, Commercial Litigation Branch, Franklin E. White, Jr., Assistant Director, Commercial Litigation Branch, and JonZachary Forbes, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Luke A. Meisner, Schagrin Associates, of Washington, DC, for Defendant-Intervenor. With him on the brief were Roger B. Schagrin and Kelsey M. Rule.

Judges: Before: Stephen Alexander Vaden, Judge.

Opinion by: Stephen Alexander Vaden

Opinion

[*1301] **Vaden, Judge**: Before the Court is the U.S. Department of Commerce's (Commerce) remand

redetermination in the scope inquiry examining the 1986 antidumping duty order (Thailand Order). The Thailand Order concerns circular welded carbon steel pipes and tubes (CWP) imported from Thailand (Case No. A-549-502), filed pursuant to the Court's remand order in [**2] *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 547 F. Supp. 3d 1278, SLIP OP. 2021-135 (CIT 2021) (*Saha Thai I*). See Final Results of Redetermination Pursuant to Ct. Remand, Oct. 16, 2021, ECF No. 58 (Remand Results). For the following reasons, the Court sustains Commerce's remand redetermination.

Background

The Court presumes familiarity with the facts of this case as set out in its previous opinion ordering a remand of this scope inquiry to Commerce and now recounts those facts relevant to the review of the Remand Results.

The order underlying the scope inquiry in this case traces its roots to 1985, when the domestic industry filed a petition requesting that Commerce examine the injury [*1302] caused by steel pipe imports from Thailand. J.A. at 1,090, ECF No. 42. In the initial investigation leading to those final determinations, petitioners requested the imposition of antidumping duties on standard and line pipes but later submitted a letter withdrawing their petition "insofar as [it] concern[ed] line pipe, TSUS numbers 610.3208 and 3209." *Saha Thai I*, 547 F. Supp. 3d at 1282; *Letter*

Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition, J.A. at 1,781, ECF No. 42. The original petitioners, which included Wheatland Tube, acknowledged that no line pipe — mono or dual-stenciled — was being produced in Thailand at [**3] the time. J.A. at 1,781; *see also* Tr. of Oral Argument (First Tr.) 6:2-7:3 (July 15, 2021), ECF No. 53. Thus, the petitioners had no information to submit in response to Commerce's questions regarding Thai line pipe's potential to harm domestic manufacturing. *See* AD & CVD Investigations of Pipes and Tubes from Thailand & Venezuela, J.A. at 1,753 (requesting that petitioners provide "[d]ocumentation which demonstrates that line pipe is manufactured in Thailand" and "[d]ocumentation which supports the allegation that line pipe from Thailand is being sold at less than fair value.").

In January 1986, Commerce issued a final determination that standard pipe from Thailand was being, or was likely to be, sold in the United States at less than fair value. *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand*; *Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3,384 (Jan. 27, 1986), J.A. at 1,216. The International Trade Commission (ITC) released its final material injury determination and report the next month. *See Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand*, Inv. Nos. 701-TA-253 and 731-TA-252, USITC Pub. 1810 (Feb. 1986) (ITC Final Determination), J.A. at 1,221. In its report, the ITC distinguished the injury caused [**4] by

standard pipe from Thailand from the injury caused by standard and line pipe from Turkey, making no material injury determination for line pipe, dual-stenciled or otherwise, from Thailand. *Id.*

The contents and scope described by these final determinations are discussed at length in *Saha Thai I.* In this subsequent adjudication, it suffices to say that dual-stenciled line pipe was never explicitly included in the scope language of either the antidumping determination or material injury determination. *Saha Thai I*, 547 F. Supp. 3d at 1282-84. After Defendant-Intervenor Wheatland Tube and other petitioners requested a determination of whether Saha Thai's sales of dual-stenciled pipe constituted a "minor alteration" of the original product, Commerce instead self-initiated a scope inquiry. *Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Self Initiation of Scope Inquiry on Line Pipe and Dual-Stenciled Standard Line Pipe*, J.A. at 1,800; *see* 19 U.S.C. § 1677j(c) (providing that merchandise "altered in form or appearance in minor respects" should still be considered within the scope of the relevant antidumping order). It ultimately issued a Final Scope Ruling finding that dual-stenciled line pipe is within the scope of the [**5] Thailand Order on June 30, 2020. *See* Final Scope Ruling, J.A. at 2,041. On July 17, 2020, Saha Thai sued Commerce, challenging the scope decision. ECF No. 6.

The Court issued a decision in *Saha Thai I* on October 6, 2021. *Saha Thai I*, 547 F. Supp. 3d 1278. In that opinion, the Court found that "Commerce's determination [*1303] that dual-stenciled pipe is covered by the Thailand Order [wa]s not supported by substantial evidence . . . [and] that Commerce's Final Scope Ruling constitute[d] an unlawful expansion of the scope of the underlying order." *Id.* The Court's decision was based on the undisputed facts that (1) Wheatland Tube explicitly withdrew line pipe from Commerce's consideration because Thailand did not manufacture line or dual-stenciled pipe in 1985-86 when the Thailand Order was finalized and (2) the ITC made no material injury determination for line pipe from Thailand. *Id.* at 1299. As a result, the Court remanded the Final Scope Ruling back to Commerce, instructing Commerce to render a redetermination consistent with the Court's opinion. *Id.* at 1281.

Commerce has now undertaken a redetermination following the instructions provided by the Court and brought forward a renewed statement of its position. To assist the parties, the Court will briefly summarize [**6] both the process undertaken by Commerce and the arguments it has articulated. Commerce filed its Remand Results on January 4, 2022. ECF No. 58. Commerce reconsidered record sources "in light of the reasoning, analysis, and conclusions of the Court," and determined, under

respectful protest,[1] that "dual-stenciled standard pipe and line pipe are **not** covered by the scope of the *Thailand Order*." Remand Results at 1-2, ECF No. 58 (emphasis added). In the original Remand Results, Commerce raised four concerns with the decision it felt it must return based on the Court's opinion. *Id.* at 13-20. First, Commerce takes issue with the Court's reliance on what Commerce asserts are "[e]xtra-[r]ecord [s]ources." *Id.* at 14-15. The disputed sources are the *ITC First Sunset Final Report* (*First Sunset Review*); the *ITC Second Sunset Final Report* (*Second Sunset Review*); and an executive order, *Presidential Proclamation 7274*, discussed in those reports. *Id.* at 14-15. Second, Commerce claims that the Court misunderstood Commerce's interpretation of 19 C.F.R. § 351.225(k)(1) and the extent to which Commerce "may (and frequently does)" find the text and materials of other petitions or orders informative in its scope analysis, as long [**7] as those materials are placed on the record. *Id.* at 16. Third, Commerce believes that the Court is mistaken about the ITC's findings. *Id.* at 16. It adduces this conclusion by noting, once again, that the Commission did make an injury determination for standard pipe, that dual-stenciled pipe is certified as standard pipe, and that Commerce understands Federal Circuit precedent to impose no requirement that the ITC analyze a particular product for that product to be covered by

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[1] *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376-77 (Fed. Cir. 2003) (holding that, when Commerce takes a position "under protest," it preserves its right to appeal).

the scope of the order. *Id.* at 16-18. Fourth and finally, Commerce argues that the Court failed to give proper weight to some of the limiting context surrounding statements in the *ITC Third Sunset Final Report* (*Third Sunset Review*) and *ITC Fourth Sunset Final Report* (*Fourth Sunset Review*). *Id.* at 18-20. Commerce later amended the Remand Results to exclude the "extraneous legal argument[s]" detailing those four concerns but left the scope decision in the Remand Results unchanged. Amended Remand Results, ECF No. 69.

The parties disagree stridently regarding Commerce's Remand Results. On February 3, 2022, Saha Thai filed comments encouraging the Court to sustain [*1304] the new outcome. Pl.'s Comments in Support of Remand [**8] Redetermination Results, ECF No. 61. On February 18, 2022, the Government invited the Court to sustain the Remand Results because the Results complied with the Court's remand order, fulfilling Commerce's legal obligations in every respect. Def.'s Resp. to Comments on Remand Redetermination, ECF No. 63. Wheatland Tube, however, objected to the logic and outcome of the Remand Results. *See* Def.-Int.'s Comments on Remand Redetermination (Def.-Int.'s Comments), ECF No. 62. It cited four reasons that largely mirror the concerns expressed by Commerce: (1) the Remand Results are not supported by evidence on the record, instead impermissibly relying on information outside the record; (2) the Remand Results ignore relevant information on the record; (3) the Remand Results are

based on a misunderstanding of the ITC's final determination in the original investigation; and (4) the Remand Results fail to properly account for all of the ITC's statements in the *Third* and *Fourth Sunset Reviews*. *See id.* For those reasons, Wheatland Tube again asks this Court to remand the scope inquiry for Commerce to reconsider its determination and find that dual-stenciled pipe is covered by the scope of the order. [**9] *Id.* at 9.

The Court held oral argument on May 17, 2022. ECF No. 72. At oral argument, both Commerce and Wheatland Tube insisted that, regardless of whether a party failed to object to the mention of extra-record evidence before the Court, Commerce and the Court would still be barred from considering such evidence. *See* Transcript of Second Oral Argument (Second Tr.) 48:22-24, 49:20-21, ECF No. 73 (Commerce counsel stating that "just because you talk about something in a proceeding doesn't mean that . . . the actual document is on the record." Commerce counsel elaborated, "I don't' [*sic*] think [Wheatland Tube] can waive the question of what's on the record."); Second Tr. 43:15-16 (counsel for Wheatland Tube arguing that "just because we failed at that time to object does not expand the universe of the record"). Ultimately, Commerce asserted that the discussion of what was or was not before the Court on the record initially was largely academic, as the issue was "overtaken by events" and Commerce's subsequent Remand Results. Second Tr. 74:18.

JURISDICTION AND STANDARD OF REVIEW

As in *Saha Thai I*, the Court has jurisdiction over Plaintiff's challenge to the Scope Ruling under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c), which grant the [**10] Court authority to review actions contesting scope determinations described in an antidumping order. The Court will sustain Commerce's remand redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New Am. Keg v. United States*, SLIP OP. 2021-30, 2021 WL 1206153, at *6 (CIT 2021). Additionally, "[t]he results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259, 38 Ct. Int'l Trade 189, SLIP OP. 2014-17 (CIT 2014) (quoting *Nakornthai Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303, 1306, 32 Ct. Int'l Trade 1272, SLIP OP. 2008-128 (CIT 2008)).

[*1305] DISCUSSION

I. Summary

The facts support Commerce's Remand Results. No line pipe was manufactured in Thailand when

Commerce undertook its initial investigation almost forty years ago, and the ITC's report made no harm finding for line or dual-stenciled pipe from Thailand. Moreover, petitioners explicitly withdrew their petition as it pertained to line pipe and have admitted that their withdrawal letter specifically covered the categories under which *all* dual-stenciled line pipe would have been imported. First Tr. 7:8-22. These facts lead to the conclusion that the scope of the Thailand [**11] Order cannot now be read to include dual-stenciled line pipe. Despite these facts, Commerce (in its respectful protest) and Wheatland Tube argue that the procedural record in other cases involving other countries overcomes the procedural record in this case; they object that Commerce's new results both rely on evidence outside the record and ignore evidence on the record. Remand Results at 14-16, ECF No. 58; Def.-Int.'s Comments at 2, 4, ECF No. 62. The record does not support these contentions, and the objections to Commerce's and the Court's evaluation of sources are unavailing.

The following facts are not in dispute. First, the scope inquiry at issue began as a circumvention ruling request in which Wheatland Tube alleged that Saha Thai "was circumventing the Thailand Order through minor alterations to Saha's merchandise." *Saha Thai I*, 547 F. Supp. 3d at 1287; *Circumvention Ruling Request*, J.A. at 1,807. Second, instead of undertaking the circumvention process, Commerce self-initiated a scope inquiry. *Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand:*

Self Initiation of Scope Inquiry on Line Pipe and Dual-Stenciled Standard Line Pipe (Nov. 22, 2019), J.A. at 1,800. Third, in that scope [**12] ruling, Commerce found that the scope of the Thailand Order included a product that was explicitly withdrawn from consideration in 1985 without citing to any change in the record of the Thailand Order but by instead citing to orders governing the same product in other countries. *See generally Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe* (June 30, 2020), J.A. at 2,041.

The record simply does not support Commerce's original scope results. "[W]hile Commerce has 'substantial freedom to interpret and clarify its antidumping [and countervailing duty] orders,' it may not do so in a way that changes them." *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1309 (Fed. Cir. 2020) (internal citations omitted) (alteration in original). However, the record does support Commerce's new results. The concerns raised by Commerce and Wheatland Tube are ultimately unpersuasive. Commerce's new results are sustained.

II. Forfeiture

Wheatland Tube objects to three documents the Court and Commerce consulted in the Remand Order and Remand Results: the *First Sunset Review*, the *Second Sunset Review*, and *Presidential Proclamation 7274*.

Def.-Int.'s Comments at 2-4, ECF No. [**13] 62. Wheatland Tube's objections, however, are forfeited. Saha Thai referenced the documents in question in both its briefing before the agency and the Court, yet Wheatland Tube and Commerce failed to object during any stage of [*1306] the prior proceedings. They have therefore forfeited their ability to contest Saha Thai's citation to those documents.

Like the Supreme Court and the Federal Circuit, this Court distinguishes waiver and forfeiture. Forfeiture is "the failure to make the timely assertion of a right," whereas waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)); *In re Google Tech. Holdings*, 980 F.3d 858, 862 (Fed. Cir. 2020). When a case is appealed from a previous proceeding, each party has a responsibility to assert all its relevant arguments; if the case returns to an appellate court after remand, any issues not raised previously are foreclosed, as demonstrated in *Vivint v. Alarm.com Inc.*, 856 F. App'x 300 (Fed. Cir. 2021). In Vivint, a home security company appealed initial unpatentability determinations from the Patent Board. *Id.* at 302. The Federal Circuit remanded the determination on various grounds; and the Board rendered a new decision, which Vivint likewise appealed. *Id.* Six weeks after Vivint filed its second appeal, the Federal Circuit issued a decision in another case, [**14] finding that the appointment of

certain Administrative Patent Judges was unconstitutional. *Id.* at 302-03. Vivint then moved to vacate the Board's remand decision, arguing that the judges who decided the remand results had been unconstitutionally appointed. *Id.* However, the Federal Circuit "found that Vivint had forfeited its constitutional argument by failing to raise an Appointments Clause challenge in its first appeal." *Id.* at 303. The court explained that "it was Vivint's obligation to raise its Appointments Clause challenge before the first court who could have provided it relief" and that "[o]nce its first appeal was decided, all matters which could have been raised then—but were not—were foreclosed. The remand after that first appeal was on one very narrow ground, and that ground is all that remains to be litigated in this subsequent appeal." *Id.* at 304; accord *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174 (Fed. Cir. 2019); *NEXTEEL Co., Ltd. v. United States*, 461 F. Supp. 3d 1336, 1343-46, SLIP OP. 2020-85 (CIT 2020) (holding arguments that could have been raised during proceedings in front of Commerce, but were not, waived and refusing to consider them on appeal); *see also United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328, 1336 (Fed. Cir. 2013) (affirming a CIT decision that denied a party's post-judgment attempt to add an argument not raised in initial briefing because the argument was forfeited). Failing to raise an argument in a previous proceeding thus forfeits the [**15] argument after the matter has been remanded and is back on appeal.

This is precisely what occurred here. In Saha Thai's opening Motion for Judgment on the Agency Record, it repeatedly refers to "the ITC's four sunset reviews" collectively. Pl.'s Mot. for J. on the Agency R. at 36, ECF No. 26 (Pl.'s Mot.); *id.* at 2 ("the ITC has repeatedly confirmed in sunset reviews"); *id.* at 39 ("the ITC's determination in the underlying investigation, and the following sunset reviews"). It was not a new argument. Saha Thai had done the same in its briefing before Commerce. *See, e.g.*, Saha Thai Steel's Comments on Scope Inquiry, J.A. at 1,930 (discussing the "determinations in the original investigation in 1985 and in *all subsequent sunset reviews*") (emphasis added); Saha Thai Steel's Scope Inquiry Case Brief, J.A. at 1,992-93 (stating in a bolded section heading [*1307] that "ITC Sunset Reviews of The Very CWP from Thailand AD Order Confirm That All Line Pipe — Including Dual-Stencil Pipe — Is Excluded From The Scope Without Qualification"; stating separately in text that "[t]he ITC's explanation in the most recent sunset review (i.e., the fourth review) is unsurprising as it is *consistent with the previous [**16] sunset reviews*.") (emphasis added); Wheatland Tube's Rebuttal Brief, J.A. at 2,015 (referring to the first sunset review as "the 2000 sunset review" and citing to sections of Saha Thai's briefing before the agency that refer to all four sunset reviews). Neither the Government nor Wheatland Tube objected to Saha Thai's references to and reliance on all four sunset reviews. *See* Def.'s Resp. to Pl.'s Mot., ECF No. 37 (Def.'s Resp.); Def.-

Int.'s Resp. in Opposition to Pl.'s Mot., ECF No. 34 (Wheatland Tube Resp.). Instead, they engaged with the argument on the merits and argued that the sunset reviews supported their position. Wheatland Tube Resp. at 16, ECF No. 34 ("The records of the initial investigation and five-year sunset reviews before the Commission further support Commerce's conclusion that standard pipe which is dual-stenciled as line pipe is included within the scope of the order."); Def.'s Resp. at 20-23, ECF No. 37 (discussing in detail Saha Thai's arguments regarding the sunset reviews and advancing opposing arguments, but not objecting to Saha Thai's references to all the sunset reviews collectively). Neither the Government nor Wheatland Tube made any distinction about the [**17] applicability of the first and second reviews as opposed to the third and fourth.[2] *See* Def.'s Resp., ECF No. 37 (silent on the issue); Wheatland Tube Resp., ECF No. 34 (same).

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[2] Furthermore, Saha Thai specifically cites to a prehearing brief filed by Wheatland Tube in the *First Sunset Review* proceedings, yet another connection with and reference to the *First Sunset Review*. Pl.'s Mot. at 18-19, ECF No. 26 ("Petitioner Wheatland Tube itself in a subsequent sunset review of the AD order . . . ."). All agree that the brief is part of the record, but Saha Thai's references to it also indicate the importance of the *First Sunset Review*. When responding to Saha Thai's characterization of Wheatland Tube's brief in the *First Sunset Review*, neither Wheatland Tube nor Commerce objected. Wheatland Tube Resp. at 19-20, ECF No. 34; Def.'s Resp. at 23, ECF No. 37. Instead, both Commerce and Wheatland Tube simply respond to Saha Thai's arguments and advance opposing points. *Id.*

Saha Thai's arguments were fully briefed and debated before the Court, including with oral argument,[3] when the Court issued its remand opinion in *Saha Thai I. 547 F. Supp. 3d 1278, SLIP OP. 2021-135 (CIT 2021).* Like Vivint, Wheatland Tube had an opportunity during the Court's initial review to raise the argument it now propounds — that the *First* and *Second Sunset Reviews* are not on the record. Despite Saha Thai's referring repeatedly to all "four sunset reviews," Wheatland Tube made no such objection. *See* Wheatland Tube Resp., ECF No. 34. As with Vivint, "[o]nce its first appeal was decided, all matters which could have been raised then—but were [*1308] not—[a]re foreclosed." 856 F. App'x at 304. The case is now before the CIT after a remand decision, and Wheatland Tube's challenge to the record is forfeited because of its failure to raise the challenge during the Court's first consideration of this case.

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[3] At the first oral argument, the Court repeatedly discussed language from the *First Sunset Review*, *Second Sunset Review*, and *Presidential Proclamation 7274*. Neither Wheatland Tube nor Commerce objected to those materials as constituting extra-record evidence. *See* First Tr. 34:2-4 (mentioning that "in that first sunset review . . . the International Trade Commission discussed the different products" and then going on to cite specific page numbers in the *First Sunset Review*); *id.* at 34:22-23 ("Fast-forward to the second review, which took place and was issued in July of 2006"); *id.* at 34:17-18 ("President Clinton's proclamation").

III. Record Evidence

[**18] Even if Commerce and Wheatland Tube did not forfeit these objections, the first two *Sunset Reviews* and *Presidential* Proclamation *7274* were fairly construed as part of the administrative record.

To dispense with *Presidential Proclamation 7274*: The Court must take judicial notice of it, and its inclusion in the record is therefore proper. 44 U.S.C. § 1507 ("The contents of the Federal Register *shall* be judicially noticed.") (emphasis added); *To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, 65 Fed. Reg. 9,193 (Feb. 23, 2000) (*Presidential Proclamation 7274*); *see* also *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 940 (Fed. Cir. 1990) ("The short answer . . . is that [the document] is on the record, having been published in the Federal Register."); *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1151 (Fed. Cir. 2021) (citing various authorities for the proposition that judicial notice of "government documents . . . 'whose accuracy cannot reasonably be questioned'" is appropriate and granting a motion to take judicial notice of documents not on the agency record and consider constitutional challenges raised relating to them). *Presidential Proclamation 7274* is also cited and discussed in the *First* and *Second Sunset Reviews*. *First Sunset Review* at 30 n.186; *Second Sunset Review* at Overview-5 n.16. Although the first two *Sunset Reviews* are not published in the

Federal Register, they are "government documents . . 'whose accuracy [**19] cannot reasonably be questioned'" so that the Court may take judicial notice of them. *Compare* 44 U.S.C. § 1507 ("The contents of the Federal Register *shall* be judicially noticed."), *with Mobility Workx*, 15 F.4th at 1151 n.1 (noting that "this court *could* take judicial notice of the existence of a trademark") (emphasis added).

The first two *Sunset Reviews* and their discussion of *Presidential Proclamation 7274* are also included in the record because "the record is not limited to documents 'relied on or used' by the agency . . . the agency cannot ignore relevant information which is before it, and the reviewing court must be in a position to determine if it ha[s] done so." *Floral Trade Council v. United States*, 709 F. Supp. 229, 230, 13 Ct. Int'l Trade 242, SLIP OP. 89-39 (CIT 1989). Contrary to Commerce's and Wheatland Tube's protestations, here "the dispute may be resolved by applying some common sense." *Id.* The Court need only ask "whether the decision can be reviewed properly without" the first two *Sunset Reviews*. *Id.* It cannot. Those two documents are so integral to Commerce's analysis that not only are they "sufficiently intertwined with the relevant inquiry," *id.*, but also "[a]ll of the information in [them] was in front of Commerce during the investigation, regardless of whether or not Commerce chose to ignore it." *F. Lli De Cecco Di Filippo Fara San Martino S.P.A. v. United States*, 980 F. Supp. 485, 487, 21 Ct. Int'l Trade 1124, SLIP OP. 97-142 (CIT 1997).

Because the later reviews [**20] constantly reference the earlier reviews, their inclusion in the record is necessary for judicial review. Here, no party disputes that the *Third* and *Fourth Sunset Reviews* are part of even the most restrictive "four-corners" [*1309] understanding of the administrative record. *See* Second Tr. 17:11-13 (The Court: "So everyone agrees that -- I assume, if anyone doesn't, please speak now --that the third and fourth reviews are on the administrative record." No party objected, and counsel for Saha Thai and Wheatland Tube answered in the affirmative. *See id.* at 17:15, 54:13-14.). The *Third Review* cites the *First Review* forty-three times; the *Second Review* fifty times. *See Third Sunset Review*. The *Fourth Review* cites the *First Review* forty times; the *Second Review* forty-four times. *See Fourth Sunset Review*. In total, the latter two *Reviews* cite the former two *Reviews* an astounding one hundred seventy-seven times. Additionally, the specific portions of the *First Review* and the *Second Review* this Court cited in *Saha Thai I* are all cited by the *Third* and *Fourth Review*. *See Saha Thai I*, 547 F. Supp. 3d at 1285-87 (citing to portions of the *First Review* cited in footnotes 49 and 77 of the *Third Review*, portions of the *Second Review* cited to in footnote [**21] 81 of the *Third Review* and footnote 54 of the *Fourth Review*).[4]

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[4] The Court additionally notes that the *Third Review* cites the entirety of the *Second Review* twice, in footnotes 12 and 31. Although the *Second Review's* Overview is not directly cited, it is

The Court here is on solid ground to consider such pervasively referenced documents from prior investigations of the same order as part of the administrative record. *See Floral Trade Council*, 709 F. Supp. at 230-31; *see also, e.g.*, *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 27 C.I.T. 1827, 1854 n.40, SLIP OP. 2003-151 (2003) (citing *Floral Trade Council* for the proposition that a document that "was before Commerce" during an investigation "may fairly be considered part of the record," especially when the "the issue was argued before this court in the parties' briefs"); *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1352 n.11, 27 Ct. Int'l Trade 715, SLIP OP. 2003-52 (CIT 2003) (permitting Commerce's use of evidence a party decried as not in the record and noting three compelling reasons: (1) the disputed document was in front of Commerce during the investigation, (2) it was cited by a document Commerce created during the investigation, and (3) the disputed document was in the public record); *AG der Dillinger Huttenwerke v. United States*, 193 F. Supp. 2d 1339, 1350, 26 Ct. Int'l Trade 298, SLIP OP. 2002-25 (CIT 2002) (declaring a document from a prior sunset review part of the record, despite Commerce having rejected its submission as untimely); *Intrepid v. Int'l Trade Admin.*, 787 F. Supp. 227, 229, 16 Ct. Int'l Trade 204, SLIP OP. 92-42 (CIT 1992) (applying the same "sufficiently intertwined" standard to

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obviously included in the *Third Review*'s citation of the entire *Second Review*.

Commerce's concurrent reviews of AD and CVD scopes).

Separate from the frequent references that the *Third* and *Fourth Sunset Reviews* make to the [**22] *First* and *Second Reviews*, Saha Thai referred to them repeatedly in its briefing to Commerce. *See, e.g., AG der Dillinger Huttenwerke*, 193 F. Supp. 2d at 1350 (finding that a document was part of the record where "the issue [it presented] was raised with sufficient clarity to put Commerce reasonably on notice in a timely manner"). For example, Saha Thai wrote that "based on the Commission's determinations in the original investigation in 1985 and in *all subsequent sunset reviews*, it is clear that the Commission's position is that line pipe and dual stenciled pipe are not included within the scope of the Order." J.A. at 1,930 (emphasis added). All the parties discuss and quote language from a brief that Wheatland Tube filed in the [*1310] *First Sunset Review* proceeding, demonstrating a familiarity with that proceeding. *See* J.A. at 1,913-14, 1,920, 2,015. The relevance of the first two *Sunset Reviews* to the scope inquiry hardly comes as a surprise. Moreover, those reviews specifically analyze the language and scope of the antidumping orders: The *First Sunset Review* discusses "the express exclusion of line and dual-stenciled pipe from relevant antidumping orders," and the *Second Sunset Review* likewise analyzes those distinctions. *Saha Thai I*, 547 F. Supp. 3d at 1285-86 (citing *First [**23] Sunset Review* at 13 n.53; *Second Sunset Review* at 11 n.55). Because Saha Thai

repeatedly referenced all four sunset reviews and because the reviews themselves cross-reference each other nearly two hundred times, all four *Reviews* are "sufficiently intertwined with the relevant inquiry" so that "the decision can[not] be reviewed [properly] without" them. *Floral Trade Council*, 709 F. Supp. at 230. They are fairly included in the record, and Commerce may not choose to ignore them.[5] *Id.*

In fact, because "Commerce chose to ignore" them, *F. Lli De Cecco*, 980 F. Supp. at 487, it was in dereliction of its duty to review all of the materials listed under 19 C.F.R. § 351.225(k)(1) (June 17, 2020).[6] Counsel for Saha Thai and Wheatland Tube agree that sunset reviews are (k)(1) materials, meaning Commerce was obligated, by regulation, to review them. *See* Second Tr. 14:21-23, 59:20-25; *Quiedan Co. v. United States*, 294 F. Supp. 3d 1345, SLIP OP. 2018-19 (CIT 2018) (including sunset reviews among the (k)(1) materials), *aff'd*, 927 F.3d 1328 (Fed. Cir. 2019). The argument Wheatland Tube is forced to advance here is that the same documents Commerce is required by regulation

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[5] This is a position with which Commerce may now appear to agree, given its statement at the most recent oral argument that "Commerce had reconsidered the issue and reconsidered these documents. They are all on the record." Second Tr. 74:19-20.

[6] 19 C.F.R. § 351.225(k)(1)(i) currently says that certain sources "may be taken into account" by the Secretary. At the time of the agency's scope determination, however, the applicable regulation said the sources "*will* be taken into account." *See* 19 C.F.R. § 351.225(k)(1)(i) (June 17, 2020) (emphasis added); *Saha Thai I*, 547 F. Supp. 3d at 1289-91.

to have considered in making its determination cannot be referenced by the Court in deciding if substantial evidence supports Commerce's determination.[7]

Saha Thai cited all four sunset reviews to Commerce. [**24] Commerce chose to rely only on the final two reviews. However, those two reviews pervasively cite the *First* and *Second Review* as well as *Presidential Proclamation 7274*. Commerce cannot choose to ignore information that is (1) cited to it, (2) part of the (k)(1) materials, and (3) "sufficiently intertwined with the relevant inquiry." *See Floral Trade Council*, 709 F. Supp. at 230-31 (holding documents from earlier investigations that become "sufficiently connected to the current [*1311] investigation [are] to be considered to be before the agency for purposes of the decision at issue"); *accord Zhejiang Native Produce*, 27 C.I.T. at 1854 n.40. *Cf.* 19 C.F.R. § 351.104(a) ("The Secretary will maintain an official record of each antidumping

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[7] Commerce appears to disagree with Wheatland Tube and agree with the Court on this issue, as it states in the Final Scope Ruling. *See* J.A. at 2,046, ECF No. 42 ("Importantly, the Court of International Trade (CIT) has stated that 'when a respondent cites (k)(1) sources as supporting a product's exclusion from the scope of an order, the court cannot consider the language of a scope order in isolation, but *must consider those sources*.'") (emphasis added). Commerce further quoted the CIT, noting that "[w]hether the order is ambiguous or not, Commerce's regulations are unambiguous—it '*will* take into account' the (k)(1) criteria in conducting a scope determination. No case has invalidated this regulatory requirement." *Id.* (alteration and emphasis in original).

and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, *or obtained by the Secretary* during the course of a proceeding that pertains to the proceeding.") (emphasis added). Commerce therefore properly considered these documents in its remand redetermination.

IV. ITC Statements

Commerce and Wheatland Tube finally dispute the Court's characterization of the ITC's final determination in the original investigation, as well as the Court's characterization of the [**25] ITC's statements in the *Third* and *Fourth Sunset Reviews*. Def.-Int.'s Comments at 5, ECF No. 62; Remand Results at 18-20. But their arguments are based on one central conceit: that the ITC does not understand the scope of the orders it reviews. The ITC has spoken with one consistent voice, repeatedly emphasizing that dual-stenciled line pipe is not within the scope of the Thailand Order. The primary problem in this case is not a tricky comparison between the product characteristics of standard and dual or mono-stenciled line pipe;[8] rather, the primary problem presented by

[8] Wheatland Tube argues that whether or not line pipe was produced in Thailand when the ITC issued its initial injury determination is immaterial because 19 U.S.C. § 1677j provides a separate avenue to cover dual-stenciled line pipe. Def.-Int.'s Comments at 7, ECF No. 62. But neither 19 U.S.C. § 1677j(c) nor § 1677j(d) change the analysis. Commerce had the opportunity to

this case is that Commerce wishes to blind itself to the ITC's repeated pronouncements. Because the Court must "hold unlawful any determination, finding, or conclusion . . . unsupported by substantial evidence on the record," 19 U.S.C. § 1516a(b)(1)(B)(i), and because that includes evidence that "fairly detracts" from Commerce's conclusions, the Court cannot allow Commerce to do so. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003).

A reference to the language in the *First* and *Second Sunset Reviews* demonstrates why Wheatland Tube and Commerce are fighting so vigorously to keep those statements out of the record. [**26] In those reviews, the ITC consistently identifies dual-stenciled pipe as line pipe, not standard pipe. The *First Sunset Review* describes "dual-stenciled line pipe" as "pipe that meets both line pipe and CWP specifications but enters as

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investigate Saha Thai's products for minor alterations under § 1677j(c) and declined to do so. *Saha Thai I*, 547 F. Supp. 3d at 1286-87. Wheatland Tube did not appeal Commerce's denial of its petition to conduct a minor alteration analysis. Section (d) is also inapplicable; dual-stenciled and line pipe are not "later-developed" merchandise. Rather, line pipe was initially included in the original petition and was voluntarily withdrawn by petitioners after they determined that it was not being produced in Thailand at the time. *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1,781-82. Wheatland Tube also did not argue before Commerce that dual-stenciled line pipe constituted later developed merchandise. *See* Wheatland Tube's Scope Comments, J.A. at 1,002 (no discussion of line pipe as later developed merchandise); Wheatland Tube's Case Br., J.A. at 1,962 (same); Wheatland Tube's Rebuttal Br. at 10, J.A. at 2,036 (same).

line pipe for customs purposes." *See Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, [*1312] Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (*First Sunset Review*), USITC Pub. 3316 at 6 (July 2000); *see also Saha Thai I*, 547 F. Supp. 3d at 1285. The *First Sunset Review* explains that, when President Clinton imposed temporary safeguard duties on line pipe, dual-stenciled line pipe was included in the safeguard duties, *but standard pipe was not*. *First Sunset Review* at 28 ("In the case of Korea . . . until safeguard duties on line pipe went into effect on March 1, 2000, they enjoyed unlimited access to the U.S. CWP market by exporting dual-stenciled line pipe"); *see also Saha Thai I*, 547 F. Supp. 3d at 1297. The *Second Sunset Review* similarly stated that President Clinton's safeguard duties were imposed on "line pipe imports . . . including 'dual-stenciled' pipe." *See Certain Pipe and Tube from Argentina, Brazil, [**27] India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271, 273, 409, 410, 532-534, and 536 (*Second Sunset Review*), USITC Pub. 3867 at 4-5 (July 2006) at Overview-5 n.16; *see also Saha Thai I*, 547 F. Supp. 3d at 1286, 1297 (elaborating that "dual-stenciled pipe *was* treated as falling under the safeguard duties imposed by President Clinton, even though the proclamation only mentions 'line pipe.'") (emphasis in original). If dual-stenciled line pipe were standard pipe, as Wheatland Tube claims, then it would not

have been subject to President Clinton's safeguard tariffs, which solely applied to "line pipe." For Wheatland Tube to be right, one must find that the ITC and President Clinton were wrong.

It is the same story regarding the later sunset reviews. Wheatland Tube and Commerce's original determination would have us believe that the ITC misspoke. In collectively describing the scopes of all the orders at issue in the *Fourth Sunset Review*, the ITC found that "[d]ual-stenciled pipe, which enters as line pipe under a different subheading of the Harmonized Tariff Schedule of the United States ("HTS") for U.S. customs purposes, is not within the scope of the orders." *See Certain Circular Welded [**28] Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey (Final)*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532-534, and 536 (*Fourth Sunset Review*), USITC Pub. 4754 (Jan. 2018) at 4. Commerce and Wheatland Tube were left to argue that "the Commission's statement was not addressing the language of each individual order but rather providing a generalized statement 'applicable to the majority of the orders, which contained explicit exclusions for dual-stenciled pipe.'" *See* Def.-Int.'s Resp. at 18, ECF No. 34 (quoting Final Scope Ruling at 15); *see also Saha Thai I*, 547 F. Supp. 3d at 1294-95. Commerce and Wheatland Tube claim this despite the ITC's having made the very same statement in *the Third Sunset Review*: "[D]ual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not

within the scope of the orders." *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532-534 and 536 (*Third Sunset Review*) at 6, USITC Pub. 4333 (June 2012).

Whether one examines all four sunset reviews or only the *Third* and *Fourth Reviews*, the ITC spoke with one consistent [**29] voice: Dual-stenciled pipe is line pipe, not standard pipe, and is not covered by the scope of any relevant order it reviewed [*1313] over nearly four decades. Commerce and Wheatland Tube wish to say that the ITC does not speak with specificity and does not know what it is talking about. The record reveals otherwise because the ITC's position never wavered from 1985 to the present. Indeed, the only ITC statement equating line pipe, dual-stenciled or otherwise, with standard pipe was the original 1986 *dissent*. *See* ITC Final Determination, J.A. at 1,277-83 (dissenting Commissioner's views). Just as Commerce may not use a scope determination to rewrite the scope under review, it may also not use a scope determination to rewrite the history of the ITC's underlying determinations. The Remand Results properly find that dual-stenciled line pipe is not covered within the Thailand Order's scope. The record before the agency — from Wheatland Tube's decision to withdraw line pipe from consideration in the original investigation to the most recent ITC sunset review — support that determination.

CONCLUSION

Commerce and Wheatland Tube have tried to argue that the full record of this proceeding should not [**30] be considered while the record in other proceedings is outcome determinative. Focusing on the record of the Thailand Order reveals that not to be the case. Commerce has returned a decision that adequately complies with the Court's Remand Order, finding on reconsideration that dual-stenciled pipe is not included in the scope of the Thailand Order. The Court's rationale in the Remand Order remain sound, and Commerce's Remand Results are supported by substantial evidence on the record. Accordingly, it is hereby:

ORDERED that the Remand Results are **SUSTAINED**.

Judgment shall be entered accordingly. A separate order will issue to reflect that the contested documents are properly considered part of the administrative record in this matter.

/s/ Stephen Alexander Vaden
Stephen Alexander Vaden, Judge
Dated: August 25, 2022
New York, New York

APPENDIX E

UNITED STATES COURT OF
INTERNATIONAL TRADE

SAHA THAI STEEL PIPE PUB. CO.
V. UNITED STATES

October 6, 2021, Dated

Court No. 1:20-cv-133

Reporter

547 F. Supp. 3d 1278 *; 2021 Ct. Intl. Trade LEXIS 138 **; SLIP OP. 2021-135; 2021 WL 4593382

SAHA THAI STEEL PIPE PUBLIC COMPANY, LTD, Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor

Subsequent History: Related proceeding at *Saha Thai Steel Pipe Pub. Co. Ltd.. v. United States*, 2023 Ct. Intl. Trade LEXIS 162, SLIP OP. 2023-158 (Ct. Int'l Trade, Nov. 13, 2023)

Prior History: Related proceeding at *Saha Thai Steel Pipe Pub. Co. Ltd.. v. United States*, 2023 Ct.

Intl. Trade LEXIS 162, SLIP OP. 2023-158 (Ct. Int'l Trade, Nov. 13, 2023)

Case Summary

Overview

HOLDINGS: [1]-The U.S. Department of Commerce erred in assessing antidumping duties on the importation of dual-stenciled pipe imported as line pipe from Thailand because the order was not supported by substantial evidence; the International Trade Commission had not included dual-stenciled pipe imported as line pipe in any injury determination concerning pipe imported from Thailand.

Outcome

Pipe company's motion for judgment on the agency record granted; case remanded to U.S. Department of Commerce.

Counsel: [**1] Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington D.C., for Plaintiff. With him on the brief was James C. Beaty.

In K. Cho, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for Defendant United States. With him on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Commercial Litigation Branch, Franklin E. White, Jr., Assistant Director, Commercial Litigation

Branch, and Jonzachary Forbes, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Luke A. Meisner, Schagrin Associates, of Washington D.C., for Defendant-Intervenor. With him on the brief were Roger B. Schagrin and Kelsey M. Rule.

Judges: Before: Stephen Alexander Vaden, Judge.

Opinion by: Stephen Alexander Vaden

Opinion

[*1281] **Vaden, Judge:** Saha Thai Steel Pipe Public Company, Ltd. (Saha), filed this case under Section 516A of the Tariff Act of 1930, as amended. Saha challenges the final scope ruling issued by the U.S. Department of Commerce (Commerce) after Commerce conducted a scope inquiry into its 1986 antidumping duty order ("Thailand Order") on circular welded carbon steel pipes and tubes (CWP) imported [**2] from Thailand (Case No. A-549-502). Saha challenges Commerce's decision to assess antidumping duties on the importation of dual-stenciled pipe imported as line pipe from Thailand. See Compl. ¶ 1, ECF No. 6. Before the Court is the Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record. Pl.'s Mot. for J. on the Agency R. (Pl.'s Mot.), ECF No. 26. For the reasons set forth below, the Court finds that Commerce's determination that dual-stenciled pipe is covered by the Thailand Order is not

supported by substantial evidence, holds that Commerce's Final Scope Ruling constitutes an unlawful expansion of the scope of the underlying order, **GRANTS** the Plaintiff's Motion, and remands the Final Scope Ruling back to Commerce to render a redetermination consistent with this Court's opinion.

Background

The products at issue in this case are Saha manufactured standard pipes, dual-stenciled pipes imported as line pipe, and line pipe, all produced in Thailand for importation into the United States. The International Trade Commission (ITC) has provided a concise and useful explanation of the differences between line pipe and standard pipe. The ITC's description, from its preliminary injury determination [**3] published before Commerce's antidumping order imposing duties on standard pipe imported from Thailand, is as follows:

> We have addressed the like product question regarding standard pipes and tubes (standard pipe) and line pipes and tubes (line pipe) in prior investigations. [*1282] In those investigations, the Commission recognized distinctions between standard pipe and line pipe. Standard pipe is manufactured to American Society of Testing and Materials (ASTM) specifications and line pipe is manufactured to American Petroleum Institute (API) specifications. Line pipe is made of higher

> grade steel and may have a higher carbon and manganese content than is permissible for standard pipe. Line pipe also requires additional testing. Wall thicknesses for standard and line pipes, although similar in the smaller diameters, differ in the larger diameters. Moreover, standard pipe (whether imported or domestic) is generally used for low-pressure conveyance of water, steam, air, or natural gas in plumbing, air-conditioning, automatic sprinkler and similar systems. Line pipe is generally used for the transportation of gas, oil, or water in utility pipeline distribution systems.

Certain Welded Carbon Steel [**4] *Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 and 253 (Preliminary), USITC Pub. 1680 (Apr. 1985), Joint Appendix (J.A.) at 1094-96, ECF No. 42. So-called dual-stenciled pipe has received both an American Society of Testing and Materials (ASTM) stencil and an American Petroleum Institute (API) stencil, indicating that it meets the minimum requirements for both standards. See J.A. at 1563 (providing a definition for dual-stenciled pipe).

I. The Original Antidumping Investigation

Early in 1985, a subcommittee of the self-named Committee on Pipe and Tube Imports, with its constituent domestic manufacturers, asked Commerce to impose antidumping duties on circular

welded carbon steel pipe imports from Thailand. *See id.* at 1090. Their original request sought the imposition of antidumping duties on standard, line, and dual-stenciled pipes. *Id.* Commerce responded to the petition with a memo on March 7, 1985, asking the petitioners to provide "[d]ocumentation which demonstrates that line pipe is manufactured in Thailand" and "[d]ocumentation which supports the allegation that line pipe from Thailand [was] being sold at less than fair value." J.A. at 1753.

After [**5] receiving Commerce's March 7th letter, the initial petitioners, among which was Defendant-Intervenor Wheatland Tube Company (Wheatland), filed an amended petition on March 12, 1985. *Amended Petition Filed by Petitioner on March 12, 1985*, J.A. at 1755-79. In that amended petition, the initial petitioners rejected a meaningful distinction between standard and line pipe. *Id.* The initial petitioners instead argued that a precedent existed that collapsed line pipe and standard pipe into a single reviewable industry and that the better distinction was between small diameter and large diameter pipes. *Id.* at 1763. Despite these arguments in their amended petition, in a subsequent letter dated March 14, 1985, the initial petitioners expressly withdrew from their "petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209." *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781-82. The Tariff Schedule of the United States (TSUS) numbers 610.3208 and 3209 are the numbers under which line

pipe, dual-stenciled or otherwise, would have been imported in 1985. See TSUS 1985 Version; *see also* Tr. of Oral Arg. 7:8-12, ECF No. 51, July 26, [**6] 2021 (Government and Wheatland's admission that line pipe and dual-stenciled pipe would have been imported under these numbers in 1985). At no point before or after submitting the March 14th letter did the initial petitioners provide any "[d]ocumentation" [*1283] supporting "the allegation that line pipe from Thailand [was] being sold at less than fair value" or even "manufactured in Thailand." J.A. at 1753. Indeed, the initial petitioners acknowledged that "no Thai company is presently licensed to produce pipe to API specifications, and imports of API line pipe from Thailand are therefore not likely." J.A. at 1781.1

About a month after the back-and-forth between Commerce and the initial petitioners, the ITC released a preliminary report titled *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela; Determination of the Commission in Investigation No. 701-TA-242: (Preliminary) Under the Tariff Act of 1930, Together with the Information Obtained in the Investigation*. The ITC determined "pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of welded carbon [**7] steel standard pipes and tubes from Thailand," *i.e.*, the standard pipe industry. J.A. at 1089. In its analysis, the ITC directly addressed the initial petitioners' argument — that distinguishing

between line and standard pipe was wrong and that the better distinction was between large and small diameter pipes — describing it as "somewhat arbitrary." *See id.* at 1096. The ITC further stated that "domestic line pipe is like imported line pipe and not like imported standard pipe," and "domestic standard pipe is like imported standard pipe and is not like imported line pipe." *Id.* The ITC also described at length the differences between standard pipe and line pipe. *See id.* at 1095.

Almost a year later in January 1986, Commerce issued its final determination that standard pipe from Thailand was being, or was likely to be, sold in the United States at less than fair value. *Circular Welded Carbon Steel Pipes and Tubes from Thailand*; *Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3384 (Jan. 27, 1986), J.A. at 1216. This Final Determination described its scope as encompassing "certain circular welded carbon steel pipes and tubes, also known as 'standard pipe' or 'structural tubing,' which includes pipe and tube with an outside diameter of 0.375 inch or more but [**8] not over 16 inches, or any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258 and 610.4925 of the Tariff Schedules of the United States Annotated." *Id.* (emphasis added). The TSUS numbers under which dual-stenciled and single-stenciled line pipes would have been imported in 1986 were not listed in this scope. This determination relied on the preliminary ITC report released in April 1985 that

addressed the material injury caused to the U.S. standard pipe industry by the importation of standard pipe from Thailand, not by line or dual-stenciled pipe. *Id*.

After Commerce issued its Final Determination on standard pipe imported from Thailand, the ITC issued its own final report in February 1986. This report addressed the material injury to domestic industry, actual and threatened, resulting from the importation of standard pipe from Thailand and the importation of line and standard pipe from Turkey. *See Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand*, Inv. Nos. 701-TA-253 and 731-TA-252, USITC Pub. 1810 (Feb. 1986) (ITC Final Determination), J.A. at 1221. The ITC evaluated the effects of both imported line pipe and standard pipe from Turkey but only evaluated the [**9] [*1284] effects of standard pipe from Thailand. *See id.* As a result of its analysis, the ITC made independent material injury determinations regarding line pipe imported from Turkey, standard pipe imported from Turkey, and standard pipe imported from Thailand. *Id*. At no point did the ITC conflate line and standard pipe of identical sizes. *See id.* at 1233-34. At no point did the ITC make a material injury determination regarding line pipe or dual-stenciled pipe imported from Thailand. *Id.* And the ITC consistently treated standard pipe and line pipe as different products throughout its injury analyses but did not mention dual or multi-stenciled pipe imported as line pipe. *See id.* at 1221-1376.

In March 1986, Commerce published its antidumping duty order (the Thailand Order) and the scope of that order included:

> The products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as "pipes and tubes"), also known as "standard pipe" or "structural tubing," which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the Tariff [**10] Schedules of the United States Annotated (TSUSA).

Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand, 51 Fed. Reg. 8341, 8341 (Dep't of Commerce Mar. 11, 1986).

Following the 1989 shift from the Tariff Schedule of the United States (TSUS) to the Harmonized Tariff Schedule of the United States (HTSUS), the language governing the scope of the Thailand Order was updated to align with the HTSUS and now states:

> The products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inch or more, but not exceeding 16 inches, of any wall thickness.

> These products, which are commonly referred to in the industry as "standard pipe" or "structural tubing" are hereinafter designated as "pipes and tubes." The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes of U.S. Customs and Border Protection (CBP), the written description of the merchandise subject to the order is dispositive.

*Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Scope Ruling on Line Pipe and Dual-Stenciled [**11] Standard and Line Pipe from Thailand*, dated June 30, 2020 ("Final Scope Ruling"), J.A. at 2042; *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments, 86 Fed. Reg. 7260* (Dep't of Commerce Jan. 27, 2021); *see also Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand; Preliminary Results of Antidumping Duty Administrative Review, 55 Fed. Reg. 42596, 42596 (Dep't Commerce Oct. 22, 1990)* (noting transition from TSUS to HTSUS)

II. Subsequent Reviews of the Thailand Order

Not quite a decade after Commerce published the Thailand Order, President William Jefferson Clinton signed the *Uruguay Round Agreements Act (URAA). Pub. L. No. 103-465, 108 Stat. 4809 (1994).* Along [*1285] with resurrecting dead copyrights on largely forgotten movies, the Uruguay Round Agreements Act established a five-year sunset review process for antidumping and countervailing duty orders. Uruguay Round Agreements Act § 220. Under this process, every five years, the administering agency and the ITC conduct a review of all active antidumping and countervailing orders to determine whether they remain necessary. 19 U.S.C. § 1675.

Since the signing of the Uruguay Round Agreements Act, the ITC has initiated, conducted, and concluded four sunset reviews of the Thailand Order. The ITC conducted its first review in 1999 and published the results in 2000; it published the results of the second review in 2006, the third review in 2012, and the fourth in 2018. *See Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, [**12] Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (*First Sunset Review*), USITC Pub. 3316 at 6 (July 2000); *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, 252, 271,

273, 409, 410, 532-534, and 536 (*Second Sunset Review*), USITC Pub. 3867 at 4-5 (July 2006); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532-534 and 536 (*Third Sunset Review*), USITC Pub. 4333 (June 2012); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey (Final)*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532-534, and 536 (*Fourth Sunset Review*), USITC Pub. 4754 (Jan. 2018).

In the ITC's *First Sunset Review*, the express exclusion of line and dual-stenciled pipe from relevant antidumping orders of line pipe was discussed. *See First Sunset Review* at 11-12, n.53. This discussion was within the context of streamlining the ITC's different and like product analyses. *See id.* at 11-12. [**13] The ITC noted that "the orders on CWP from Thailand and Turkey (CVD) have no express exclusions for products excluded from the scopes in all later cases, including line pipe, OCTG, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit." *Id.* n.53. Notably, none of these products have ever been treated as within the scope of the Thailand Order, despite the lack of an express exclusion. *Cf.* J.A. *passim*.

Elsewhere in the same sunset review, the ITC discussed line pipe and dual-stenciled line pipe in the context of "safeguard duties" imposed by President

Clinton on every country reviewed that produced line pipe and dual-stenciled pipe at the time, except Canada and Mexico. *First Sunset Review* at 28; *see also To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, Proclamation No. 7274, 65 Fed. Reg. 9191 (Feb. 23, 2000).[2] In that discussion, the ITC notes that dual-stenciled pipe imported as line pipe, and line pipe *simpliciter*, were excluded from antidumping orders but were nonetheless subject to President Clinton's "safeguard duties" covering line pipe. *First Sunset Review* at 28.

When the ITC conducted its second review of the Thailand Order and other similar [**14] [*1286] antidumping orders, the safeguard duties against line pipe had expired or otherwise ended. *See Second Sunset Review* at 11, n.55. Nonetheless, in the *Second Sunset Review* the ITC noted that dual-stenciled pipe imported as line pipe had only been subject to duties under President Clinton's safeguard duties covering line pipes, not standard pipes: "Following an affirmative determination by the Commission, in March 2000, President Clinton issued Proclamation 7274, imposing additional duties of 19 percent on line pipe imports of more than 9,000 short tons annually (including "dual-stenciled" pipe but excluding "arctic grade" line pipe)." *Id.* at Overview-5 n.16. The *Second*

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[2] The Proclamation's safeguard duties expired in March 2003. Proclamation No. 7274, 65 Fed. Reg. at 9194.

Sunset Review also noted that "multiple-stenciled line pipe requires additional steel than CWP [*sic*] to meet American Petroleum Institute (API) specifications applicable to line pipe. At [then] current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications." *See id.* at 13 n.66.

In its third review of the Thailand Order, the ITC described the scope of all Orders under its review and in that description [**15] included this caveat: "[D]ual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders." *Third Sunset Review* at 8. The Thailand Order did not receive a special carve out from the general language of the *Third Sunset Review's* scope.[3] *See id.*

In the *Fourth Sunset Review* of the Thailand Order in January 2018, the ITC reiterated the position that it took in the *Third Sunset Review*, that it implied or

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[3] The argument that the lack of an express exclusion in the Thailand Order means the *Third Sunset Review's* scope cannot possibly include the Thailand Order within its general exclusion of line pipe, single or dual-stenciled, is unavailing. That Thailand's order does not expressly exclude line pipe or dual-stenciled pipe is a function of Thailand's production capacity. It is not an expression of intent to include line pipe, single and dual-stenciled, within the scope of the Thailand Order. As mentioned above, Thailand's order does not include an express exclusion because Thailand did not produce line pipe or dual-stenciled line pipe at the time the Thailand Order was issued.

stated in the first and second reviews, and that Commerce expressed in 1985, 1986, and 2012. *See Fourth Sunset Review* at 6-7. The *Fourth Sunset Review* stated that line pipe, which includes dual-stenciled pipe, was not within the scope of the antidumping orders concerning standard pipes:

> Producers primarily make CWP to ASTM specifications A53, A135, and A795.26 Since these standards often require engineering characteristics that overlap with other specifications, a pipe may be dual stenciled, i.e., stamped to indicate compliance with two different specifications, such as ASTM A53 and API 5L. Dual-stenciled pipe, which enters as line pipe under a different subheading of the Harmonized Tariff [**16] Schedule of the United States ("HTS") for U.S. customs purposes, is not within the scope of the orders.

Id.

III. The Scope Determination in Question

In January 2019, Wheatland told Commerce "that certain imports of merchandise from Thailand that are entering the United States as 'line pipe' are circumventing" the Thailand Order and requested that Commerce make a circumvention ruling against Saha. *Circumvention Ruling Request*, J.A. at 1807. According to Wheatland and Southland Tube Company, the [*1287] domestic interested parties

who filed the request, Saha was circumventing the Thailand Order through minor alterations to Saha's merchandise. *See id.* They alleged that Saha began exporting what Wheatland considered "minorly-altered standard pipe" after Saha's dumping margin jumped from 1.36 percent to about 28 percent. *See id.* at 1811.

On November 22, 2019, Commerce self-initiated a scope inquiry into the Thailand Order. *Memorandum from Leo Ayala, International Trade Compliance Analyst, Office VII, Antidumping and Countervailing Duty Operations, to James Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, regarding Antidumping Duty Order on Circular Welded Carbon [**17] Steel Pipes and Tubes from Thailand: Self Initiation of Scope Inquiry on Line Pipe and Dual-Stenciled Standard Line Pipe* (Nov. 22, 2019), J.A. at 1800. Before the scope inquiry, during the inquiry, and since, Saha has consistently asserted that its dual-stenciled line pipes are not standard pipes with minor alterations and that these dual-stenciled line pipes are outside the antidumping duty order's scope. J.A. at 1171-1203, 1898-1953, and 1975-2022.

Commerce issued a preliminary scope ruling in February 2020, finding for the first time in thirty-four years that dual-stenciled line pipe is within the scope of the Thailand Order while single-stenciled line pipe is not. *See Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand:*

Preliminary Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe (Feb. 24, 2020), J.A. at 1954. All the parties submitted comments and arguments on the preliminary ruling. J.A. at 1962-2040. Commerce remained unmoved; and in its Final Scope Ruling, Commerce again found that dual-stenciled pipe is within the scope of the Thailand Order. *See* Final Scope Ruling, J.A. at 2042.

IV. The Present Case

On July 17, 2020, Saha sued [**18] the Department of Commerce seeking to overturn its scope decision. ECF No. 6. Wheatland intervened in the case on August 12, 2020. ECF No. 15. In December 2020, Saha filed its Motion for Judgment on the Agency Record, for which the Court held an extensive hearing on July 15, 2021. ECF Nos. 26 and 47. Counsel for all parties attended. During the hearing, the Court asked several questions.

The first question was:

> [Y]ou can just tell me with a simple yes or no if the statement as I have presented it is factually correct or not.... [I]n 1985 to 1986, the country of Thailand did not produce line pipe, including dual stenciled-line pipe.

Tr. of Oral Arg. 5:24-25, 6:1-4, ECF No. 51, July 26, 2021. The Government responded "Your Honor, our understanding is that the - the stated reason for the

withdrawal - affirmative withdrawal of the original petition was that - was the notion that there was no manufacture of line pipe in Thailand at the time." *Id.* at 6:12-16. Wheatland stated it understood "that there was neither production of regular single stenciled line pipe nor dual stenciled standard inline [*sic*] pipe in Thailand at the time the petitions were filed." *Id.* at 7:1-3.

The second question the [**19] Court asked was:

> Was all line pipe, including dual stenciled line pipe, in 1985/86 imported under TSUS Codes 610.3208 and/or 610.3209?

Id. at 7:8-10. Both the Government and Wheatland admitted that dual-stenciled pipe would have been imported under the TSUS codes for line pipe in 1985 and 1986. *Id.* at 7:11-22.

[*1288] At the end of the hearing, the Court ordered the Government and Wheatland to review this case's record thoroughly. After reviewing the record, the Court required them to write a letter identifying for the Court "in the record of this matter" where "there was an instance or more than one instance of...the Government" referring "explicitly to dual stenciled pipe as standard pipe." *Id.* at 71:3-7. The Court also gave Saha's counsel the right to respond. *Id.* at 72:1-7.

> **Brazil, Mexico, and Korea**: Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in the orders.
>
> **Taiwan**: Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind or used for oil and gas pipelines is also not included in the scope of the order.

Wheatland, like the Government, also identifies the same language from other antidumping orders that is quoted in the *Fourth Sunset Review*. Wheatland's Letter Re: *Saha Thai Steel Pipe Public Company Limited v. United States* (Ct. No. 20-00133): Response to Court's July 15, 2021 Order, at 1-2, ECF No. 50. But Wheatland goes even further and cites additional quotes from the preliminary and final investigations into CWP imported from China. *Id.* at 3-4; *Circular Welded Carbon-Quality Steel Pipe from China*, Inv. Nos. 701-TA-447 and 731-TA-1116 (Preliminary), USITC Pub. 3938 (July 2007); *Circular Welded Carbon-Quality Steel Pipe from China*, Inv. Nos. 701-TA-447 and 731-TA-1116 (Final), USITC Pub. 4019 (July 2008). [**21]

Interestingly, the language that the Government and Wheatland have referenced in response to the Court's order is all language from antidumping orders that the Government and Wheatland have consistently argued "are not probative of the [Thailand] order's

scope." Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. (Def.'s Resp.) at 18, ECF No. 37. The Government in its response brief had argued that antidumping orders for other countries are not "enumerated under 19 CFR 351.225(k)(1)" and that the (k)(1) materials do not "include determinations [from] proceedings on similar products from different countries." *Id.* at 19. Wheatland likewise argued that the antidumping orders and investigations dealing with other countries "are not included within the 'scope determinations' that Commerce must consider under section (k)(1)." *See* Defendant-Intervenor's Resp. to Pl.'s Mot. for J. on the Agency R. (Def.-Int.'s Resp.) at 21, ECF No. 34. As Wheatland put it, "Saha Thai fails to appreciate that agency determinations arising from different orders with different scope language—even if similarly captioned" are not relevant. *Id.* And "[i]ndeed, there is no basis in law for Saha Thai's assertion that scope determinations arising from [**22] different proceedings involving different records and different scope language should have any bearing on Commerce's analysis of the (k)(1) sources." *Id*

Saha timely responded to the Government and Wheatland's letters. ECF No. [*1289] 52. In its response letter, Saha pointed out that the Government and Wheatland do not cite to any document or statement in the record underlying the Thailand Order. *Id.* at 1. Saha highlighted how the Government and Wheatland's letters quote language from other antidumping orders that do not involve pipe imports from Thailand. *Id.* at 1-2.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to the Scope Ruling under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting scope determinations described in an antidumping order. The Court must sustain Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). If they are supported by neither substantial evidence nor the law, the Court must "hold unlawful any determination, finding, or conclusion found." *Id.* "[T]he question is not whether the Court would have reached [**23] the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New American Keg v. United States*, SLIP OP. 2021-30, 2021 WL 1206153, at *6 (Ct. Int'l Trade 2021).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described

"substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)).

DISCUSSION

I. Legal Framework

The Federal Circuit has arguably provided the United States Court of International Trade with two distinct methods that the Court may use to begin its analysis of the lawfulness of Commerce's scope inquiries into antidumping orders. The first method evaluates the content of the plain language of an antidumping order without reference to any other document, except typical references used when analyzing any law or regulation, such as a dictionary. *See OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020). The second method is the *Meridian* method, which requires an analysis of a scope's language within the context of [**24] the (k)(1) materials, *i.e.*, the administrative documents produced during the agency process that led to the antidumping order. Meridian Prods., LLC v. United States, 890 F.3d 1272, 1277 (Fed. Cir. 2018). Both methods seek to determine whether a scope's language is sufficiently ambiguous that Commerce must resort to additional documents or considerations to interpret an order's scope.

Under *OMG*, "the first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous." *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). "If it is not ambiguous, [*1290] the plain meaning of the language governs." *Id.* But "[i]f the language is ambiguous, Commerce must next consider the . . . '(k)(1) materials.'" *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (citations omitted).

Under *Meridian*, "the plain language of an antidumping order is paramount." *Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018). But when "reviewing the plain language of a duty order, Commerce must consider" the (k)(1) materials. *Id.* at 1277; *see also Midwest Fastener Corp. v. United States*, 494 F.Supp.3d 1335, 1340, SLIP OP. 2021-7 (Ct. Int'l Trade 2021) ("When considering the scope language, Commerce will take into account descriptions of the merchandise contained in . . . [the (k)(1) sources]"). If the above method does "not dispositively answer the question, Commerce may consider the...so-called (k)(2) factors." *Meridian Prods.*, 890 F.3d at 1278.

Regardless of the method, the question of whether a scope's language is ambiguous is reviewed by the Court [**25] *de novo*. *OMG*, 972 F.3d at 1363; *Meridian Prods.*, 851 F.3d at 1282. After its *de novo* review of Commerce's ambiguity determination in this

case, the Court has determined that the distinction between the Federal Circuit's two methods is of no moment given that the plain language of the Thailand Order's scope is ambiguous without the context of the (k)(1) materials. Whether the Court uses the (k)(1) materials from the beginning or uses them only after reading the original scope does not matter. In this case, the (k)(1) materials must be read.

The (k)(1) materials consist of "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). So-called "Sunset Reviews" conducted pursuant to the Uruguay Round Agreements Act are (k)(1) materials. *See Quiedan Co. v. United States*, 294 F.Supp.3d 1345, SLIP OP. 2018-19 (Ct. Int'l Trade 2018) (including sunset reviews among the (k)(1) materials), *aff'd*, 927 F.3d 1328 (Fed. Cir. 2019). Also included among the (k)(1) materials are "determinations of...the [ITC]," such as injury determinations. 19 C.F.R. § 351.225(k)(1).

"A fundamental requirement of both U.S. and international law is that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question." *Wheatland Tube Co. v. United States*, 973 F.Supp. 149, 158, 21 Ct. Int'l Trade 808, SLIP OP. 97-100 (Ct. Int'l Trade 1997) [**26] , *aff'd*, 161 F.3d 1365 (Fed. Cir. 1998). The law permitting Commerce to

issue antidumping orders, 19 U.S.C. § 1673, "is remedial, [and] . . . was designed to protect domestic industry from sales of imported merchandise at less than fair value which either caused or threatened to cause injury." *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 608 F.Supp. 653, 656, 9 Ct. Int'l Trade 213 (Ct. Int'l Trade 1985). Therefore, "[w]here the domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute." *Id.* at 657. And Commerce cannot "assess antidumping duties on products intentionally omitted from the ITC's injury investigation." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998). Allowing the ITC to assess such duties without an injury determination "would itself frustrate the purpose of the antidumping laws." *Id.*

If these (k)(1) materials are dispositive, whether they are evaluated while initially interpreting a scope or evaluated only after a scope is found ambiguous, Commerce may issue a final ruling based on those [*1291] materials. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). If the (k)(1) materials are not dispositive, Commerce must consider "(k)(2) factors," which include "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2); *see also* 19 C.F.R. § 351.225(e); *Meridian Prods.*, 890 F.3d at 1278.

Although this Court owes "significant deference" to Commerce's interpretation of its orders, Commerce cannot issue an interpretation that changes the scope of the order nor "interpret an order in a manner contrary to its terms." *See Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1094-95 (Fed. Cir. 2002) (*quoting Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)).

II. Analysis

A. Summary

Saha's Motion for Judgment on the Agency Record presents three principal issues: First, whether Commerce's decision to include dual-stenciled pipe within the scope of the Thailand Order is supported by substantial evidence; second, whether Commerce's final scope decision unlawfully expands the scope to [**27] include merchandise that was not part of the final injury determination of the ITC; and third, whether Commerce's final scope decision is otherwise not in accordance with law because it is contrary to the Federal Circuit's decision in *Wheatland Tube Co. v. United States*, 161 F. 3d 1365 (Fed. Cir. 1998). Pl.'s Mot., ECF No. 26.

Saha's argument is straightforward: Commerce unlawfully expanded the scope of the Thailand Order by ignoring overwhelming evidence that dual-stenciled line pipe was not treated as standard pipe by the ITC or by Commerce and was intentionally

excluded from the ITC's injury determination and Commerce's Thailand Order. Therefore, dual-stenciled line pipe is outside the Thailand Order's scope. *See* Pl.'s Mot. at 16-24, ECF No. 26. Saha supports its contention with documents that fall within the (k)(1) materials and with documents, orders, and determinations concerning the same products from other countries. *See* J.A., ECF No. 42; *see also* Pl.'s Mot. at 20, ECF No. 26.

Commerce responds that its determination that dual-stenciled pipe is within the scope of the Thailand Order is supported by substantial evidence because the order's plain language unambiguously encompasses dual-stenciled pipe. *See* Def.'s Resp. at 16-20, ECF No. 37. Commerce [**28] rejects Saha's contention that there is probative value in antidumping orders, ITC determinations, and Commerce's determinations that cover the same products but are from different countries. *See id.* at 18-20. Finally, Commerce asserts that its determination is consistent with the (k)(1) materials, but that those materials do not need to be consulted given the unambiguous language of the Thailand Order's scope. *See id.* at 15-18, ECF No. 37.[4]

The Court disagrees with Commerce's interpretation of the plain language of the scope and the short shrift it gives to the (k)(1) materials. Reviewing the

[4] Wheatland's arguments are essentially aligned with the Government's.

Thailand Order's scope language *de novo*, the Court holds that the language is ambiguous without the context provided by the (k)(1) materials. *See OMG*, 972 F.3d at 1363 (scope ambiguity determinations by Commerce receive *de novo* review). Therefore, the [*1292] Court, like Commerce, must rely on the (k)(1) materials to interpret the Thailand Order's scope language. *See Mid Continent Nail Corp.*, 725 F.3d at 1302.

After reviewing the (k)(1) materials in the administrative record with the appropriate deference, the Court finds that Commerce lacks substantial evidence for its position that dual-stenciled pipe imported as line pipe is included within the Scope of the Thailand [**29] Order; Commerce has instead unlawfully sought to expand the scope of its original order. First, Thailand did not produce dual-stenciled pipe at the time of the original investigation and order, and the request was effectively withdrawn from consideration by the petitioners themselves. Second, the (k)(1) materials show that the ITC made no injury determination as to dual-stenciled or mono-stenciled line pipe from Thailand; therefore, antidumping duties cannot be imposed on those types of pipes when imported from Thailand. Third, Commerce and the ITC throughout the (k)(1) materials consistently treat dual-stenciled pipe as line pipe when imported into the United States.

The Court first will address Commerce's plain language arguments; then it will turn to an analysis of the (k)(1) materials.[5]

B.

The original Thailand Order's scope in its entirety reads:

> The products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as "pipes and tubes"), also known as "standard pipe" or "structural tubing," which includes pipe and tube with an outside diameter of [**30] 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234,

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[5] The Court will not discuss *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) at length. *Wheatland Tube Co.* involved an analysis of the following question: If the language in an antidumping order's scope expressly excludes a given product, but that product is then imported and used for the same purpose as the products otherwise covered by that same order, does the excluded product then fall under the scope of that antidumping order? *See Wheatland Tube Co.*, 161 F.3d at 1368-69. The answer *Wheatland Tube Co.* gave is no, it does not fall under the scope unless the scope is ambiguous and the (k)(1) materials are not dispositive. *Id.* at 1369-70.

The present case deals with an entirely different legal issue - the applicability of an antidumping order's scope to products neither expressly included in nor expressly excluded from that scope, and whether the (k)(1) materials underlying that antidumping order support by substantial evidence the reading of that scope to nevertheless include those otherwise unmentioned products.

> 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the Tariff Schedules of the United States Annotated (TSUSA).

Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand, 51 Fed. Reg. 8341, 8341 (Dep't of Commerce Mar. 11, 1986).

Commerce later rearranged the scope language, amended the TSUS numbers to reflect the change to the HTSUS, and added language asserting that the HTSUS numbers are simply examples and are not exhaustive of what might be covered by the Thailand Order:

> The products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inch or more, but not exceeding 16 inches, of any wall thickness. These products, which are commonly referred to in the industry as "standard pipe" or "structural tubing" are hereinafter [*1293] designated as "pipes and tubes." The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes of U.S. Customs

> and Border Protection (CBP), the written description of the merchandise subject to the order [**31] is dispositive.

Final Scope Ruling, J.A. at 2042.

Commerce argues that the plain language of the amended Thailand Order's scope is "not ambiguous and supports Commerce's determination that dual stenciled pipe is within the scope of the order," and therefore the inquiry should stop there. Def.'s Resp. at 13, ECF No. 37. Because, according to Commerce, the Thailand Order is unambiguous, "the 'plain language of the order governs.'" *Id.* (quoting *OMG*, 972 F.3d at 1364). It is unclear, however, what language in the order Commerce believes governs given that Commerce fails to direct the Court to specific language in the scope that plainly subjects dual-stenciled pipe imported as line pipe to the Thailand Order. *Id.* at 13-16.

Wheatland attempts to bolster Commerce's textual argument by asserting that "[t]he scope covers all circular welded carbon steel pipes and tubes from Thailand with an outside diameter of 0.375 inch or more, but not exceeding 16 inches." *See* Def.-Int.'s Resp. at 12, ECF No. 34. Wheatland argues that, because dual-stenciled pipe imported as line pipe possesses the same shape characteristics of the merchandise described in the scope language, dual-stenciled pipe falls under the scope's plain

language; [**32] and no further analysis is necessary. *See id.* at 14-15.

The problem with the Defendants' analysis of the text of the scope is that the Defendants look at the language of only one-third of the scope, isolating the language about size and diameter from the rest of the text. The scope includes more. The original scope also lists a set of TSUS item numbers that do not include, as all the parties agreed, the item numbers under which dual-stenciled pipe would have been imported in 1986. *See* Tr. of Oral Arg. 6:12-7:3; 7:11-22, ECF No. 51, July 26, 2021 (all parties agreeing that dual-stenciled pipe would have been imported in 1986 under TSUS item numbers that were expressly excluded from the scope of the original antidumping order). These item numbers, as the amended Thailand Order scope says, are not dispositive. *See also Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1270 (Fed. Cir. 2002) (reasoning that absence of particular HTSUS classification number does not show exclusion of any merchandise); *Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990) (reasoning that reference to TSUS classification number is not dispositive); *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 977-78, 22 Ct. Int'l Trade 285, SLIP OP. 22-285, SLIP OP. 98-40 (Ct. Int'l Trade 1998), *aff'd*, 185 F.3d 882 (Fed. Cir. 1999) ("The inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping or countervailing [**33] duty orders but classified

under an HTSUS heading not listed in the petition"). Though not dispositive, their absence certainly does not provide evidence that dual-stenciled line pipe's inclusion is supported by the scope's plain language.[6]

[*1294] Reading further past the language convenient for Wheatland's argument, the scope also states that the pipes subject to the Thailand Order are "commonly referred to in the industry as 'standard pipe.'" J.A. at 2042. Meaning, the scope applies not simply to circular welded pipes with a given size or shape, but rather circular welded pipes that meet the industry standards and specifications required for those pipes to qualify as "standard pipes" *and* are

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[6] Wheatland's argument that size and shape are the only relevant characteristics for classifying different kinds of pipes has also been consistently rejected by Commerce and the ITC. For example, the ITC in 1985 called this approach "somewhat arbitrary" and did not apply it in its injury determinations, instead taking great care to distinguish between standard and line pipe. J.A. at 1096. During the scope inquiry that led to this case, Wheatland used this same argument again while attempting to convince Commerce to apply the Thailand Order not only to dual-stenciled line pipe but also to mono-stenciled line pipe. J.A. at 1004-06. Commerce rejected Wheatland's argument in its Final Scope Ruling insofar as mono-stenciled line pipe is concerned, noting as the Court does that "[t]he historical documents establish that the investigations of both Commerce and the ITC were limited to standard pipe." J.A. at 2053. And that "to impose AD duties, Commerce must determine that the class or kind of merchandise has been found to be sold at less than fair value, and the ITC must conclude that a domestic industry has been materially injured or threatened with material injury." J.A. at 2053-54.

referred to by the industry as "standard pipes" in common usage. *Id.* But what exactly is "standard pipe," and does it include dual-stenciled pipe? The language of the scope itself is silent. Given this, the Court, like Commerce, must turn to the (k)(1) materials to resolve the ambiguity. *Id.* at 2047 (expressly determining that it must examine the (k)(1) materials to resolve the question). The Court, therefore, considers next whether, viewed with the appropriate deference, the record as a whole supports [**34] Commerce's decision with substantial evidence.

C. The (k)(1) Materials

The (k)(1) materials consist of "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). Saha argues that these materials do not support Commerce's decision to include dual-stenciled pipe imported as line pipe within the scope of the Thailand Order but rather lead to the opposite conclusion. *See* Pl.'s Mot. at 16-26, ECF No. 26. Saha supports its argument by noting that Thailand did not produce dual-stenciled pipe at the time of the order, that the original petitioners withdrew from consideration products imported under TSUS item numbers 610.3208 and 3209, and that the ITC never made a legally required injury determination for imported Thai produced dual-stenciled pipe. *See id.* at 26. Saha also directs the

Court's attention to the various sunset reviews and argues that these reviews consistently treat dual-stenciled pipe as line pipe. *See id.* at 32-34.

Commerce and Wheatland respond that the amended petition itself does not exclude dual-stenciled pipe in its language; therefore, [**35] dual-stenciled pipe is not excluded from the scope. *See* Def.'s Resp. at 20, ECF No. 37; Def.-Int.'s Resp. at 12, ECF No. 34. They also argue that the original ITC investigation only excluded line pipe and did not expressly exclude dual-stenciled pipe that receives both an ASTM standard pipe stencil and an API line pipe stencil so that any pipe with an ASTM stencil would fall within the ITC's injury determination. *See* Def.'s Resp. at 16, ECF No. 37. Finally, they assert that, when the sunset reviews emphasized that the antidumping orders under review excluded dual-stenciled pipe, "the Commission's statement was not addressing the language of each individual order but rather providing a generalized statement 'applicable [*1295] to the majority of the orders, which contained explicit exclusions for dual-stenciled pipe.'" *See* Def.-Int.'s Resp. at 18, ECF No. 34 (quoting Final Scope Ruling at 15).

Without going deeply into the (k)(1) materials, one finds the following definition: "Standard pipe is [pipe that is] manufactured to American Society of Testing and Materials (ASTM) specifications." *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, USITC Pub. 1680 at 7-8

(internal [**36] references omitted). With this aid, the meaning of the scope becomes clearer: The products subject to the Thailand Order as described by its scope consist of circular welded pipes with a specific range of diameters, any wall thickness, the production and metal quality of what are commonly called "standard pipes," and that obtain an American Society of Testing and Materials stencil. *See id.*

Even this explanation of the Thailand Order's scope raises one final question: Does "standard pipe" refer only to mono-stenciled standard pipe, or does it also include dual-stenciled pipe - pipe that meets both the minimum specifications demanded by the American Society of Testing and Materials for standard pipe and has the higher quality steel and has passed the more stringent tests required to receive an American Petroleum Institute line pipe stencil? That the scope raises this question and does not answer it means that there is an ambiguity that must be resolved, and thus a much deeper evaluation of the (k)(1) materials is necessary to understand the boundaries of the scope. After reviewing the (k)(1) materials, the Court finds that the original petition, the injury determination, and the sunset [**37] reviews do not support Commerce's final scope ruling on the Thailand Order with substantial evidence. They instead reflect that Commerce has unlawfully expanded the scope of its original order.

1. Initial Investigation and Injury Determination

In their first petition in 1985, the initial petitioners requested an investigation of pipe imported from Thailand under a variety of item numbers found in the Tariff Schedules of the United States at the time, including item numbers 610.3208 and 3209. *See* J.A. at 1706. Dual-stenciled pipe imported as line pipe would have been imported under these numbers at the time of the original Thailand Order. *See* TSUSA 1985 Version; *see also* Tr. of Oral Arg. 7:11-22, ECF No. 51, July 26, 2021. But after Commerce sent an inquiry asking for evidence that Thailand produced such pipes, the initial petitioners decided to expressly withdraw their "petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209." *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781-82.

Once the initial petitioners withdrew all pipes that were importable under 610.3208 and 3209 from consideration by the ITC and Commerce, those pipes were [**38] not included in either the resulting injury investigation conducted by the ITC or the antidumping order issued by Commerce. *See Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781-82 (letter from petitioners withdrawing from their "petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209"). Consequently, the ITC has never conducted an injury investigation, nor made an injury

determination, on pipes imported from Thailand that are dual-stenciled, or obtain an API stencil, regardless of whether those pipes also have an ASTM stencil.

[*1296] Commerce cannot impose a duty on a fiction. API stenciled pipes, *i.e.* line and dual-stenciled pipes, were omitted by the decision of the petitioners themselves from the ITC's original injury investigation. The parties have also admitted that Thailand *did not produce* line pipes, dual-stenciled or otherwise, at the time the ITC conducted its injury investigation. Tr. of Oral Arg. 6:12-16, 7:1-3, ECF No. 51, July 26, 2021. It is well settled that Commerce cannot "assess antidumping duties on products intentionally omitted from the ITC's injury investigation." *Wheatland Tube Co.*, 161 F.3d at 1371. Allowing Commerce to assess such [**39] duties without an *injury* determination "would itself frustrate the purpose of the antidumping laws." *Id.* And finding that the ITC determined a product that did not yet exist somehow injured domestic industry would frustrate common sense.

Since their initial omission from the original injury investigation, the ITC has conducted no subsequent injury investigation to determine whether API stenciled pipe from Thailand injures a domestic industry. Given that it is "a fundamental requirement" in our law "that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question," the lack of such an injury determination for

API stenciled pipes is fatal to Commerce's case. *See Wheatland Tube Co.*, 973 F. Supp. at 158, *aff'd*, 161 F.3d 1365 (Fed. Cir. 1998).

It is worthwhile to note that, when the ITC conducted its injury investigation of domestic industries affected by pipes imported from Thailand, the ITC's preliminary report on the subject addressed the injury caused to domestic industries by not only standard pipes imported from Thailand but also the injury caused by imported standard and line pipes from Venezuela. *See Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 [**40] and 731-TA-252 and 253 (Preliminary), USITC Pub. 1680 (April 1985). In that report, the ITC emphasized that imported standard pipe and line pipe affect separate industries and are different products. At every point, it was careful to not conflate line pipe and standard pipe when discussing imports from Thailand. *See id.* at 7-8.

The same holds true for the ITC Final Determination. J.A. at 1221. The ITC did not include line pipe or dual-stenciled pipe imported as line pipe within the description of the investigation's scope into Thailand circular welded pipes. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 8384 (Jan. 27, 1986). The only discussion of line pipe appears in the sections of the report addressing Turkish imports, and the Commissioners were cautious even in their section headings to use

"line pipe" only in conjunction with Turkey. *See, e.g.*, ITC Final Determination, J.A. at 1244-45 (differentiating among "standard pipe imports from Thailand," "standard pipe imports from Turkey," and "line pipe imports from Turkey").

Most notably, the only conflation of standard pipe and line pipe came from the two Commissioners in *dissent*. *Id.* at 1263-83 (dissenting views of Vice Chairman Liebeler and Commissioner [**41] Brunsdale). Commissioner Brunsdale thought that the Commission should not separate its analysis of standard pipes and line pipes but should instead consider them as one product to be analyzed together.[7] *Id.* at 1281. [*1297] That this view was in dissent further points to the lack of evidence of *any* harm finding from the ITC regarding the importation of line pipe, including dual-stenciled line pipe, from Thailand. With no harm determination from the ITC, Commerce lacks legal authority to impose duties on dual-stenciled pipe. *See Wheatland Tube Co.*, 161 F.3d at 1371.

[7] Interestingly, the dissent found that, if viewed as one product instead of two, there would be no harm to domestic producers. Thus, the dissent wished to conflate line pipe and standard pipe to block the imposition of tariffs on either type of pipe. ITC Final Determination, J.A. 1281. Nearly forty years later, Commerce wants to conflate the two types of pipe to achieve the exact opposite result.

2. Sunset Reviews

Although a finding that the ITC's injury determination did not cover dual-stenciled pipe is sufficient to overturn Commerce's scope determination, the ITC's sunset reviews reinforce the Court's finding that dual-stenciled, or API stenciled pipe of any kind, was not included in the Thailand Order's scope. *See Quiedan Co.*, 294 F.Supp.3d 1345, 1351-53, SLIP OP. 2018-19 (including sunset reviews among the (k)(1) materials), *aff'd*, 927 F.3d 1328 (Fed. Cir. 2019). Every sunset review of the Thailand Order treats dual-stenciled pipe as line pipe. For example, the first two sunset reviews did not find that dual-stenciled pipe imported from any country affected the domestic standard pipe industry. *See First Sunset Review* (makes no findings as to whether dual-stenciled [**42] pipe imported as line pipe affects the domestic standard pipe industry); *see also Second Sunset Review* at 13 n.66. Additionally, when the first two sunset reviews discussed duties on dual-stenciled pipe from countries that produced it at the time, it was solely in the context of President Clinton's safeguard duties on line pipe. The ITC consistently understood those duties to apply to dual-stenciled pipe, not just mono-stenciled line pipe, and *not to apply* to standard pipe. *First Sunset Review* at 28 ("In the case of Korea...until safeguard duties on line pipe went into effect on March 1, 2000, they enjoyed unlimited access to the U.S. CWP market by exporting dual-stenciled line pipe"); *Second Sunset Review* at Overview-5 n.1 ("Following an affirmative determination by the

Commission, in March 2000, President Clinton issued Proclamation 7274, imposing additional duties of 19 percent on line pipe imports of more than 9,000 short tons annually (including "dual-stenciled" pipe but excluding "arctic grade" line pipe)."). If dual-stenciled pipe is standard pipe and is only excluded from antidumping orders on standard pipe when it is expressly excluded in the language of those orders' scopes, [**43] then dual-stenciled pipe would have fallen under neither the antidumping orders that excluded it nor the safeguard duties imposed by President Clinton that covered line pipe. But dual-stenciled pipe *was* treated as falling under the safeguard duties imposed by President Clinton, even though the proclamation only mentions "line pipe." *Id.*

The *Second Sunset Review* also expressly rejected the argument that dual or multiple-stenciled pipe affected the same industry as standard pipe. The review found that "multiple-stenciled line pipe requires additional steel than CWP to meet American Petroleum Institute (API) specifications applicable to line pipe. At [then] current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications." *Second Sunset Review* at 13 n.66.

Consistent with the first two sunset reviews, the *Third* and *Fourth Sunset Reviews* also treat dual-stenciled pipe as line pipe. The *Fourth Sunset Review* states in its scope that "[d]ual-stenciled pipe, which

enters as line pipe under a different sub [*1298] heading of the Harmonized Tariff Schedule of the United States ("HTS") [**44] for U.S. customs purposes, is not within the scope of the orders." *Fourth Sunset Review* at 6-7. The *Third Sunset Review's* language is largely identical. *See Third Sunset Review* at 8. Both statements are unqualified and give no indication that the scope language does not apply to the Thailand Order. Commerce's argument that the language in these sunset reviews only applied to dual-stenciled pipe imported from every country other than Thailand is not persuasive. The language of the third and fourth reviews is unqualified and consistent with the treatment of dual-stenciled pipe, or API stenciled pipe, at each stage of the administrative process. *Cf., e.g.*, ITC Final Determination at J.A. 1233-34 (differentiating among "standard pipe imports from Thailand," "standard pipe imports from Turkey," and "line pipe imports from Turkey").

No review, original or sunset, has determined that dual-stenciled or API stenciled pipe from Thailand injures a domestic industry. Given that when a "domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute," Commerce's expansion of the Thailand Order's scope is unlawful. *Badger-Powhatan*, 608 F. Supp. at 657.

CONCLUSION

The Court finds that Commerce's determination is both unsupported by substantial evidence and not issued in accordance with the law. No Thai manufacturer produced dual-stenciled pipe imported as line pipe at the time of the order; therefore, dual-stenciled pipe could not have been included within the scope. Tr. of Oral Arg. 5:24-25, 6:12-16, 7:1-3, ECF No. 51, July 26, 2021. The initial petitioners expressly withdrew from Commerce and the ITC's consideration the item numbers under which dual-stenciled pipe would have been imported. *Letter Dated March 14, 1985, from Petitioner Regarding Partial Withdrawal of Petition*, J.A. at 1781-82. There has been no injury determination as required by 19 U.S.C. § 1673 and case law. *See Badger-Powhatan*, 608 F. Supp. at 657 ("Where the domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute"). The ITC has not included dual-stenciled pipe imported as line pipe in any injury determination concerning pipe imported from Thailand. [**48] And for nearly four decades, the ITC has treated dual-stenciled pipe as line pipe and has noted in the relevant sunset reviews the exclusion of dual-stenciled pipe imported as line pipe from the scope of the orders imposing duties on standard pipes.

For the foregoing reasons, this matter is remanded for Commerce to conduct an analysis that considers the sources listed in 19 C.F.R. § 351.225(k)(1) in assessing whether dual-stenciled pipe falls within the scope of

the Thailand Order, and it shall do so in compliance with the reasoning in this Opinion and Order. Commerce may not assess tariffs on any item absent an injury determination from the ITC. This Opinion and Order in no way disturbs Commerce's finding that mono-stenciled line pipe is outside the scope of the Thailand Order.

Thus, on consideration of the Plaintiff's Motion for Judgment on the Agency Record and all papers and proceedings had in relation to this matter, and on due deliberation, it is hereby:

ORDERED that Plaintiff's motion for judgment on the agency record is **GRANTED**;

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a Remand Redetermination in compliance with this Opinion and Order;

ORDERED [**49] that Defendant shall supplement the administrative record with all documents considered by Commerce in reaching its decision in the Remand Redetermination;

ORDERED that Plaintiff shall have 30 days from the filing of the Remand Redetermination to submit comments to the Court; and

ORDERED that Defendant and Defendant-Intervenor shall have 15 days from the date of Plaintiff's filing of comments to submit a reply.

/s/ Stephen Alexander Vaden
Stephen Alexander Vaden, Judge
Dated: October 6, 2021
New York, New York

APPENDIX F

19 USCS § 1673

Current through Public Law 118-137, approved December 1, 2024.

United States Code Service > TITLE 19. CUSTOMS DUTIES (Chs. 1 — 29) > CHAPTER 4. TARIFF ACT OF 1930 (§§ 1001 — 1683g) > COUNTERVAILING AND ANTIDUMPING DUTIES (§§ 1671 — 1677n) > IMPOSITION OF ANTIDUMPING DUTIES (§§ 1673 — 1673i

§ 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

> by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 735(b)(1) [19 USCS § 1673d(b)(1)], a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

HISTORY:

June 17, 1930, ch 497, Title VII, Subtitle B, § 731 as added July 26, 1979, P. L. 96-39, Title I, § 101, 93 Stat. 162; Oct. 30, 1984, P. L. 98-573, Title VI, § 602(b), 98 Stat. 3024; Dec. 8, 1994, P. L. 103-465, Title II, Subtitle A, § 233(a)(1)(A), (2)(A)(i), 108 Stat. 4898.

APPENDIX G

19 USCS § 1516a

Current through Public Law 118-137, approved December 1, 2024.

United States Code Service > TITLE 19. CUSTOMS DUTIES (Chs. 1 — 29) > CHAPTER 4. TARIFF ACT OF 1930 (§§ 1001 — 1683g) > ADMINISTRATIVE PROVISIONS (§§ 1401 — 1654) > ASCERTAINMENT, COLLECTION, AND RECOVERY OF DUTIES (§§ 1481 — 1550)

§ 1516a. Judicial review in countervailing duty and antidumping duty proceedings

(b) Standards of review.

(1) Remedy. The court shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under subparagraph (A), (B), or (C) of subsection (a)(1), to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B)

(i) in an action brought under paragraph (2) of subsection (a), to be

unsupported by substantial evidence on the record, or otherwise not in accordance with law, or

(ii) in an action brought under paragraph (1)(D) of subsection (a), to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

APPENDIX H

5 USCS § 706, Part 1 of 4

Current through Public Law 118-137, approved December 1, 2024.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 13146) > Part I. The Agencies Generally (Chs. 1 — 10) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise

reviewed on the record of an agency hearing provided by statute; or

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX I

<u>19 CFR 351.225</u>

This document is current through the Dec. 5, 2024 issue of the Federal Register, with the exception of the amendments appearing at 89 FR 96790 and 89 FR 96830.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 19 Customs Duties > Chapter III — International Trade Administration, Department of Commerce > Part 351 — Antidumping and Countervailing Duties > Subpart B — Antidumping and Countervailing Duty Procedures

§ 351.225 Scope rulings.

(a) Introduction. Questions sometimes arise as to whether a particular product is covered by the scope of an antidumping or countervailing duty order. Such questions may arise for a variety of reasons given that the description of the merchandise subject to the scope is written in general terms. The Secretary will initiate and conduct a scope inquiry and issue a scope ruling to determine whether or not a product is covered by the scope of an order at the request of an interested party or on the Secretary's initiative. A scope ruling that a product is covered by the scope of an order is a determination that the product has

always been covered by the scope of that order. This section contains rules and procedures regarding scope rulings, including scope ruling applications, scope inquiries, and standards used in determining whether a product is covered by the scope of an order. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(k) Scope rulings.

(1) In determining whether a product is covered by the scope of the order at issue, the Secretary will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.

(i) The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of the Secretary:

(A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;

(B) The descriptions of the merchandise contained in the initial

investigation pertaining to the order at issue;

(C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and

(D) Determinations of the Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

(ii) The Secretary may also consider secondary interpretive sources under paragraph (k)(1) introductory text of this section, such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence. However, in the event of a conflict between these secondary interpretive sources and the primary interpretive sources under paragraph (k)(1)(i) of this section, the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue.